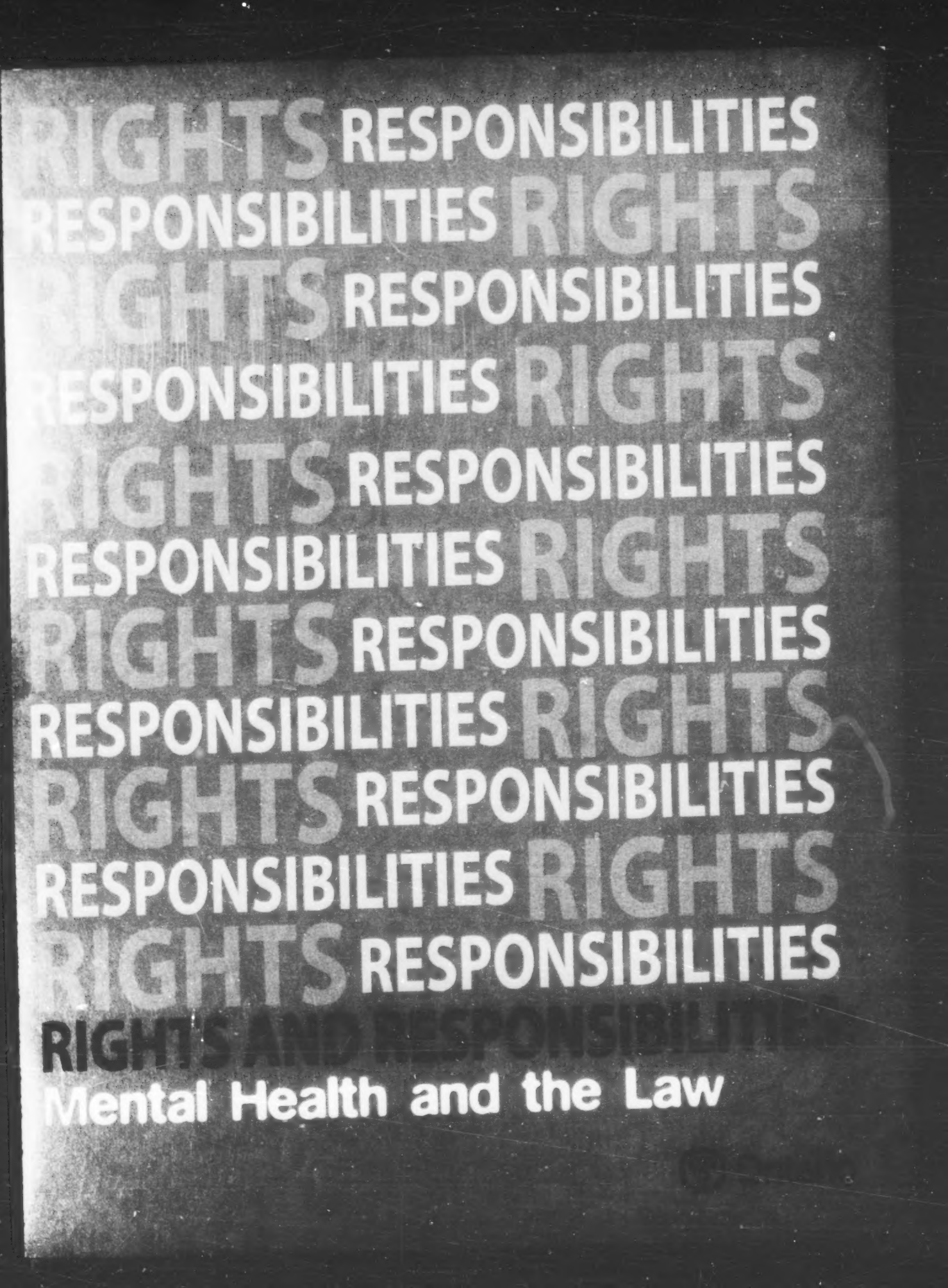
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RIGHTS AND RESPONSIBILITIES
Mental Health and the Law

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The purpose of this publication is to help you understand the *Mental Health Act,* as well as parts of the *Substitute Decisions Act* and the *Health Care Consent Act.*

This material does not give an official interpretation of the law and is not a replacement for professional advice or a substitute for reading the legislation.

Legislation changes from time to time. This material was published in January 2001 and does not reflect changes that may have been made to the law after that date. This document does include the changes made to the *Mental Health Act* and the *Health Care Consent Act* as a result of *Brian's Law (Mental Health Legislative Reform), 2000,* which was proclaimed December 1, 2000.

Further information and materials are available through the Ministry of Health and Long-Term Care website at www.gov.on.ca/health/.

Information is also available on the Consent and Capacity Board website at www.ccboard.on.ca.

Copies of the forms referred to in this document are available through the website at http://www.gov.on.ca/health/.

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## ABOUT THE LEGISLATION

Mental health, consent, and substitute decision-making laws provide the legal framework for the care, treatment and hospitalization of those who are suffering from mental health problems, or who are incapable of making their own life decisions. These laws are meant to balance the right to autonomy and self-determination with the right to care, protection and treatment, as well as the safety of the community.

## THE *MENTAL HEALTH ACT*

The *Mental Health Act* and its regulations deal with issues such as:

- Which hospitals in Ontario are considered to be "psychiatric facilities;"
- How and when a person may be brought to a psychiatric facility;
- How a person may be admitted to a psychiatric facility;
- How a person may be kept in hospital;
- Who may see a patient's records from a psychiatric facility;
- Financial incapacity of inpatients under the Act in a psychiatric facility;
- The rights of patients to information and legal review concerning a number of matters, including involuntary hospitalization, Community Treatment Orders, access to and disclosure of records and management of their property;
- How and when Community Treatment Orders may be issued, renewed or terminated.

## THE *HEALTH CARE CONSENT ACT*

The *Health Care Consent Act* and its regulations deal with issues such as:

- The rule that there must generally be informed, capable consent before treatment or admission to a care facility;
- How health practitioners are to deal with emergency situations where legally valid consent is not available;
- How to determine if a person is capable of making decisions about medical treatment, admission to a nursing home or home for the aged, and personal assistance services in any of those facilities;
- How to identify the appropriate substitute decision-maker for an incapable person;
- How a substitute decision-maker should make decisions for someone not capable of making decisions about treatment, admission to a care facility or personal assistance services;
- Options available if a substitute decision-maker makes decisions in an improper fashion.

## THE *SUBSTITUTE DECISIONS ACT*

The *Substitute Decisions Act* and its regulations deal with issues such as:

- Powers of attorney, guardianships and other matters relating to long-term arrangements for substitute decision-making;
- How continuing powers of attorney for property or personal care may be given;
- How Statutory Guardianship for property may be created when an assessor determines that a person is not capable of managing property;
- How a court may appoint a guardian for property or personal care;
- Powers of, and rules of, decision-making for guardians and attorneys.

# PART I:

Our communities are home to many people with mental and physical challenges, including those with mental health problems. Many of these individuals have difficulty managing their own affairs and making their own decisions. There are many different ways to deal with these issues.

Some of these involve the use of the law in order to ensure safety or treatment or to make life decisions for an individual. Others involve steps that can be taken to assist people suffering from some level of impairment without the necessity for formal legal intervention.

Sometimes, a combination of practical and formal legal arrangements is required. Each case is different. There is no "one size fits all" solution.

Good starting points for information and referral include the local public health departments, local Community Care Access Centres, local branches of the Canadian Mental Health Association and the Association for Community Living.

Consumer and family groups often provide valuable support and information.

## FORMAL OPTIONS

The *Substitute Decisions Act* includes a number of tools that may assist with decision-making and care for individuals who are, or may become, incapable of handling these matters by themselves.

### Power of Attorney

A power of attorney is a very important legal document that one person can use to grant another person or persons authority to make important decisions on his or her behalf.

There are three different types of powers of attorney in Ontario.

**1. Power of Attorney for Personal Care**
This type of power of attorney may give authority to make decisions about any, or all, of the following: health care, nutrition, shelter, clothing, hygiene and safety on behalf of the person signing the power of attorney.

**2. Continuing Power of Attorney for Property**
This type of power of attorney gives authority to deal with the property and money of the person signing the power of attorney. This type of power of attorney remains valid even if the person who signed it becomes incapable.

**3. General Power of Attorney for Property**
This type of power of attorney remains valid only when the person who signed it is capable of managing his or her own property. It is traditionally used by persons who need someone to manage their financial affairs because of a planned trip. It is not useful for people wishing to plan for their incapacity.

**(For further information on Power of Attorney, please see page 28.)**

### Ulysses Contract

Some people worry that they will resist necessary care if they become incapable. In order to deal with this problem, the *Substitute Decisions Act* creates a particularly powerful type of power of attorney for personal care. This is often referred to as a "Ulysses Contract."

A Ulysses Contract may contain a number of special provisions including clauses allowing for the use of necessary and reasonable force to facilitate the person's hospitalization and treatment.

Because a Ulysses Contract is so powerful, there are strict rules that must be followed when it is made. Failure to follow these rules will make the Ulysses Contract invalid. For this reason, professional advice is strongly recommended for anyone wishing to create a Ulysses Contract.

### Statutory Guardianship

The following is a very brief outline of Statutory Guardianship. Arrangements can be made for a professional called an "assessor" to visit a person to decide if he or she is capable of managing property. *This procedure is not available if the requestor is aware of a continuing power of attorney for property that gives authority over all of the person's property.*

If the assessor determines that the person is incapable, the Public Guardian and Trustee will become the Statutory Guardian for property with responsibility for managing the person's property. *It is possible for a family member or certain other persons to apply to the Public Guardian and Trustee to take over from that office.*

An attending physician in a psychiatric facility must assess whether an inpatient in his or her care is capable of managing property. The *Mental Health Act* defines "psychiatric facility" as "a facility for the observation, care and treatment of persons suffering from mental disorder, and designated as such by the Minister." The

*Act* defines "mental disorder" as "any disease or disability of the mind."

If the physician determines that the person is incapable, the Public Guardian and Trustee will become the Statutory Guardian for property with responsibility for managing the person's property. It is possible for a family member or certain other persons to apply to the Public Guardian and Trustee to take over from that office.

**(For further information on Statutory Guardianship, please see page 30.)**

## Guardianship Investigations

The Public Guardian and Trustee is an independent government official. One of the jobs of the Public Guardian and Trustee is to investigate cases where it is thought that someone is incapable of making decisions about property or personal care, and serious harm is occurring or may occur to them as a result.

If the investigation indicates that a serious situation exists, the Public Guardian and Trustee must apply to the court for a temporary guardianship order.

You may contact the Guardianship Investigations Unit of the Public Guardian and Trustee by calling 1-800-366-0335.

## Court-Appointed Guardianship

Anyone may apply to the Superior Court of Justice to be named as a person's Court-appointed guardian. There are two types of Court-appointed guardianships: guardianship for property and guardianship for personal care.

Depending on the exact wording of the order, a Court-appointed guardian for property may handle all aspects of a person's property, with the exception of making a will.

Depending on the wording of the judge's order, a Court-appointed guardian for personal care may have authority in the areas of health care, nutrition, shelter, clothing, hygiene, and safety.

**(For further information on Guardianship, please see page 31.)**

## Leave of Absence from a Psychiatric Facility

A leave of absence may be granted to a patient who is in a psychiatric facility under the authority of the *Mental Health Act.*

The attending physician may place a patient on a leave of absence from the psychiatric facility, if the intention is that the patient shall return to the facility. The officer in charge of the psychiatric facility may also place a patient on a leave of absence, upon the advice of the attending physician, even if there is no intention that the patient shall return to the facility. The officer in charge may place certain terms or conditions on this leave. Both the attending physician and the patient must comply with these terms or conditions.

A violation of the terms or conditions of the leave of absence may result in the patient being returned to the facility.

A leave may be granted for a maximum of three months.

## Release from a Psychiatric Facility on a Community Treatment Order

Legislative changes to the *Mental Health Act* have introduced Community Treatment Orders (CTOs) as an option for those who require psychiatric treatment for serious, recurring mental illness.

CTOs are a comprehensive plan of community-based treatment or care and supervision that is less restrictive than being detained in a psychiatric facility.

A physician may issue or renew a CTO for a person if the legislative test outlined below is met.

First, during the previous three-year period (prior to the issuing or renewing of the CTO), the person must have been a patient in a psychiatric facility on two or more separate occasions, OR for a cumulative period of 30 days or more. If the person was the subject of a previous Community Treatment Order, this portion of the test will also be satisfied.

In addition to the requirement of prior hospital stays, or the existence of a previous Community Treatment Order, the following criteria must be met:

1) The person, or his or her substitute decision-maker, the physician who is considering issuing or renewing the order, and any other person involved in the person's treatment or care and supervision have developed a Community Treatment Plan for the person;

AND

2) Within the 72-hour period before entering into the Community Treatment Plan, the physician examined the person and is of the opinion that:

a) The person is suffering from mental disorder such that he or she needs continuing treatment or care

and continuing supervision while living in the community;

b) The person meets the criteria for the completion of an application for psychiatric assessment, *where the person is not currently a patient in a psychiatric facility;*

c) If the person does not receive continuing treatment or care and continuing supervision while living in the community, he or she is likely, because of mental disorder, to:

i) Cause serious bodily harm to self; **or**

ii) Cause serious bodily harm to another; **or**

iii) Suffer substantial mental or physical deterioration of the person; **or**

iv) Suffer serious physical impairment of the person.

d) The person is able to comply with the Community Treatment Plan contained in the Community Treatment Order;

e) The treatment or care and supervision required under the terms of the Community Treatment Order are available in the community;

AND

3) The physician has consulted with the health practitioners or other persons proposed to be named in the Community Treatment Plan;

AND

4) The physician is satisfied that the person subject to the order and his or her substitute decision-maker, if any, have consulted with a rights adviser and have been advised of their legal rights (unless the person refuses to consult with the rights adviser);

AND

5) The person or his or her substitute decision-maker consents to the Community Treatment Plan in accordance with the rules for consent under the *Health Care Consent Act.*

The purpose of a CTO is to provide a person who suffers from a serious mental disorder with a comprehensive plan of community-based treatment. People who may be eligible include people who experience a certain pattern during their illness. Specifically, CTOs are designed for the person who:

- Is admitted to a psychiatric facility where his or her condition is stabilized;
- Is then released from the facility;
- Stops the treatment or care and supervision;
- Has a change in condition;
- Needs to be re-admitted to a psychiatric facility.

CTOs can be issued for involuntary psychiatric patients who agree to a treatment/supervision plan as a condition of their release from a psychiatric facility to the community.

CTOs can also be issued or renewed for individuals who are not patients in a psychiatric facility, if the criteria outlined above are met.

A person who is being considered for a CTO or who is subject to a CTO, and that person's substitute decision-maker both have a right to retain and instruct counsel (and to be informed of that right) and a right to consult a rights adviser. As well, each time a CTO is issued or renewed, the person subject to the order, or any person on his or her behalf, may apply to the Consent and Capacity Board to inquire into whether the criteria for issuing or renewing a CTO have been met.

There is an automatic review by the Board after the second renewal of a CTO and every second renewal thereafter, even if the person does not ask the Board for a hearing.

A CTO will expire six months after the day it is made, unless it is renewed or terminated. An order may be terminated earlier by the physician who issued or renewed the order in situations where the person subject to the order fails to comply with his or her obligations under the order. If a person fails to comply with his or her obligations, a physician may be able to issue an order for examination of the person and have the person returned to the psychiatric facility.

A physician who issued or renewed a CTO may issue an order for examination of a person subject to a CTO if the following conditions are met:

1) The physician has reasonable cause to believe that the person subject to the order has failed to comply with his or her obligations under the order;

2) The physician has reasonable cause to believe that the person subject to the order:

a) Is suffering from mental disorder such that he or she needs continuing treatment or care and continuing supervision while living in the community;

b) Meets the criteria for an application for psychiatric assessment under the *Mental Health Act;*

c) Is likely because of mental disorder, to cause serious bodily harm to himself or herself or to another person, or will suffer substantial mental or physical deterioration or serious physical impairment, if he or she does not receive continuing treatment or care and continuing supervision while living in the community;

AND

3) Reasonable efforts have been made to:

a) Locate the person;

b) Inform the person or the person's substitute decision-maker of the failure to comply;

c) Inform the person or the person's substitute decision-maker of the possibility that the physician may issue an order for examination and the possible consequences; and

d) Provide the person with assistance to comply with the terms of the order.

If an order for examination is issued by a physician, a police officer has authority, for 30 days after the order is issued, to take the person named in the order into custody and then promptly to a physician.

A CTO may also be terminated prior to its expiry date if consent to the order is withdrawn by the person, or the person's substitute decision-maker. As well, an order may be terminated upon request of a person or person's substitute decision-maker for a review of the person's condition.

## Conditional Releases Under the *Criminal Code*

Some individuals are in a psychiatric facility because a court has found them unfit to stand trial or not criminally responsible. The Ontario Review Board is responsible for deciding if and when these individuals will be allowed to leave the facility. In some cases, the Board may put certain restrictions or conditions on the release.

Other individuals who have been charged or convicted of a crime may have received suspended sentences, parole or probation and are in the community on a form of conditional release such as probation or parole.

Others are placed on what is commonly known as a peace bond.

Violation of the terms of a conditional release can result in the person's return to custody.

# PART II:

There are many different ways that a person may come, or be brought, from the community to a hospital or other facility because of a mental disorder.

## VOLUNTARY ADMISSION

***A voluntary patient is a person who is staying in a psychiatric facility of his or her own free will.***

A person may be admitted to a psychiatric facility voluntarily on the recommendation of a physician at the facility. That physician must believe that the person is in need of the treatment offered at the facility. (A psychiatric facility is a hospital that provides psychiatric services and is designated as such by the Minister and listed on one of the approved schedules to the *Mental Health Act*.)

## INFORMAL ADMISSION

***The meaning of "informal patient" has changed over the years. It now refers only to a person who has been found incapable with respect to a proposed treatment, and has been admitted to a hospital or psychiatric facility with the consent of the person authorized to make his or her treatment decisions.***

The section in this guide on consent to treatment explains how a determination of incapacity is made and how the appropriate substitute decision-maker is identified.

### Informal Admission to a Psychiatric Facility for Treatment of a Mental Disorder

A person may be admitted to a psychiatric facility as an informal patient for the purpose of treatment of a mental disorder if a health practitioner has found the person incapable of making decisions about a proposed treatment, and has obtained consent to treatment from the appropriate substitute decision-maker and **any** one of the following applies:

- The person does not object to the admission;
- The person is under 16 years old;
- The consent giver is the patient's court-appointed guardian of the person if the guardian has the authority to make the type of decision required;
- The consent giver is the person's attorney for personal care under a valid Ulysses Contract that specifically allows the use of necessary and reasonable force to admit the person to a psychiatric facility.

### Other Informal Admissions

The above rules are for admission to a psychiatric facility for the purpose of treating a mental disorder. Different rules apply to other situations.

### General Information on Informal Admission

The law does not set a maximum time period for an informal admission.

An informal patient may apply to the Consent and Capacity Board to review the informal admission and/or the Finding of Incapacity. The Board must review the status of long-term informal patients in psychiatric facilities who are between the ages of 12 and 16. Any time six months pass without the young person applying, the psychiatric facility is required to inform the Board so that a hearing can be held.

## INDIVIDUALS CHARGED WITH A CRIMINAL OFFENCE

The *Mental Health Act* and the Criminal Code each have special provisions dealing with persons who are charged with a criminal offence and are, or may be, suffering from a mental disorder.

### Under the *Mental Health Act*

A judge may order a person appearing before the court to attend a psychiatric facility for examination if:

- The person is charged with, or convicted of, a criminal offence; and
- The judge has reason to believe that the person is suffering from a mental disorder.

The judge may also order that the person be *admitted* to a psychiatric facility for a period of up to two months.

An order for admission or examination may only be made with the agreement of the senior physician at the psychiatric facility.

In both situations, the senior physician responsible for clinical services at the facility must give the judge a written report.

### Under the *Criminal Code*

A person who is found unfit to stand trial or not criminally responsible for an offence because of mental disorder, may be detained in a psychiatric facility designated by the Minister of Health and Long-Term Care, or released subject to conditions. Sometimes the conditions include a requirement that the person (referred to as the "accused") report to the administrator of a psychiatric facility.

A tribunal known as the Ontario Review Board, appointed under the mental disorder part of the Criminal Code, is required to make decisions about the custody and conditional discharge of those people considered unfit, or not criminally responsible. The Board may order the absolute discharge of an accused considered not criminally responsible.

An accused who is detained in a psychiatric facility is generally subject to the statutory rules that govern hospitalization and treatment, and is also subject to the special rules in the Criminal Code governing the care and treatment of mentally disordered offenders.

## UNAUTHORIZED ABSENCE OF A PATIENT

The *Mental Health Act* contains special provisions for the return of individuals to a psychiatric facility. These provisions apply to persons who are legally required to stay in the facility but are absent without permission. The person may be returned to the same psychiatric facility or to the closest psychiatric facility.

Once the officer in charge becomes aware of a person's absence an Order for Return (Form 9) must be issued forthwith. A police officer or any other person to whom the officer in charge issues the Order must make reasonable attempts to return the person.

A Form 9 is valid for one month after the officer in charge becomes aware of the absence. If the person is still at large one month after the officer in charge becomes aware of the absence, the missing patient is legally considered discharged from the facility.

Assisting a person who is on an unauthorized absence from a psychiatric facility to remain outside of the facility is an offence.

## YOUNG PERSONS

The provisions of the *Mental Health Act* and the *Health Care Consent Act* apply to persons of all ages. A young person may be admitted to a psychiatric facility as a voluntary, involuntary or informal patient under those provisions.

In addition, young persons are also covered by the *Child and Family Services Act*. These provisions only apply to young persons under the age of 16, unless the young person is already the subject of a child protection order by the court. If there is such an order, these provisions apply until age 18.

## BY ORDER OF A JUSTICE OF THE PEACE

Anyone may ask a Justice of the Peace to sign an Order for Examination (Form 2). The purpose of the Form 2 is to allow the police to apprehend and bring the person to a physician for examination. The examination will usually be done at a hospital emergency unit. The purpose of the examination is for the physician to decide whether or not to sign a Form 1, which authorizes the detention and assessment of the person in hospital for up to 72 hours (see page 12, By Order of a Physician).

A Justice of the Peace can use two methods to issue a Form 2.

### Method One

The Justice of the Peace may issue a Form 2 if at least one of the criteria from ***both*** of the following two tests are met:

**THE PAST/PRESENT TEST.**

The Justice of the Peace must receive information under oath that the person:

- Has threatened or is threatening to cause bodily harm to self; **or**
- Has attempted or is attempting to cause bodily harm to self; **or**
- Has behaved or is behaving violently towards another person; **or**
- Has caused or is causing another person to fear bodily harm from him or her; **or**
- Has shown or is showing a lack of competence to care for self.

TEST 2

## THE FUTURE TEST.

The Justice of the Peace must also have reasonable cause to believe the person is ***apparently*** **suffering from mental disorder** that will ***likely*** result in:

- Serious bodily harm to self; **or**
- Serious bodily harm to another person; **or**
- Serious physical impairment of self.

The third ground, "serious physical impairment of self," is designed to deal with unintentional harm.

Examples of unintentional harm might include wandering in the extreme cold, or putting oneself at serious risk for harm at the hands of others, or through gross neglect. A Justice of the Peace is not required to make a medical diagnosis.

### Method Two

A Justice of the Peace may also issue an Order for Examination of the person if the following test is satisfied.

First, the Justice of the Peace must receive information under oath that the person:

1) *Has previously received treatment* for a mental disorder of an ongoing or recurring nature that, when not treated, will likely result in:

a) Serious bodily harm to the person; **or**

b) Serious bodily harm to another person; **or**

c) Substantial mental or physical deterioration of the person; **or**

d) Serious physical impairment of the person.

AND

The person has shown clinical improvement as a result of the treatment.

In addition, the Justice of the Peace must have reasonable cause to believe that the person:

2) *Is apparently suffering* from the same (or a similar) mental disorder as the one for which he or she previously received treatment.

AND

Given the person's history of mental disorder and current mental or physical condition, the person is likely to:

a) Cause serious bodily harm to self; **or**

b) Cause serious bodily harm to another person; **or**

c) Suffer:

i) Substantial mental deterioration; **or**

ii) Substantial physical deterioration; **or**

iii) Serious physical impairment.

AND

The person is apparently incapable, within the meaning of the *Health Care Consent Act,* of consenting to his or her treatment in a psychiatric facility, and the consent of his or her substitute decision-maker has been obtained.

Once the Order for Examination of the person is signed, it authorizes a police officer to apprehend the person named on the form.

A Form 2 signed by a Justice of the Peace and a Form 1 signed by a physician (page 12) are similar in the following way:

- Both forms authorize apprehension of the person in the community for a period of seven days, including the day that the form is signed.

A Form 2 and a Form 1 are different in several ways, including the following:

- A Form 1 authorizes the holding of the person for up to 72 hours at a psychiatric facility. The Form 2 does not. The Form 2 authorizes the detention of a person just long enough for a doctor to make an initial examination. The doctor will decide if a Form 1 is appropriate.

If the doctor examines a person brought to him or her on a Form 2 and then signs a Form 1, the person can be detained in a psychiatric facility for an assessment as described below. If the doctor does not sign a Form 1, depending on the circumstances, the person may be:

- Admitted, with his or her consent, as a voluntary patient;
- Admitted as an informal patient. (Informal admission is only permitted in limited circumstances and requires the consent of the person entitled to make treatment decisions for the person.);
- Released; **or**
- Placed on a Community Treatment Order, assuming the statutory criteria are met.

Justices of the Peace can be found in provincial court houses during normal business hours. In emergency

situations police are often able to help find a Justice of the Peace.

## BY A POLICE OFFICER ACTING ON HIS OR HER OWN AUTHORITY UNDER THE *MENTAL HEALTH ACT*

In certain circumstances a police officer without a Form 2 (see page 38) may take a person in custody for an examination by a physician. The examination will usually be done at a hospital emergency unit. The purpose of the examination is for the physician to decide whether or not to sign a Form 1, which authorizes the detention and assessment of the person in hospital for up to 72 hours (see By Order of a Physician on this page).

An officer may only exercise this authority if:

- The officer has reasonable cause to believe that it would be dangerous to wait for a Justice of the Peace to sign a Form 2; and
- The officer has reasonable and probable grounds to believe that a person is acting or has acted in a disorderly manner.

(The courts have interpreted this to mean behaviour that is to some extent irrational, although not necessarily unruly. *There is no need for the officer to have reasonable and probable grounds to believe that criminal conduct is occurring or has occurred.)*

The following two tests must also be met:

### TEST 1 *THE PAST/PRESENT TEST.*

The officer must have reasonable cause to believe that the person:

- Has threatened or is threatening to cause bodily harm to self; **or**
- Has attempted or is attempting to cause bodily harm to self; **or**
- Has behaved or is behaving violently towards another person; **or**
- Has caused or is causing another person to fear bodily harm from him or her; **or**
- Has shown or is showing a lack of competence to care for self.

### TEST 2 *THE FUTURE TEST.*

The officer is of the opinion that the person is ***apparently*** **suffering from a mental disorder** that will ***likely*** result in:

- Serious bodily harm to the person; **or**
- Serious bodily harm to another person; **or**
- Serious physical impairment of the person.

The third ground, "serious physical impairment of the person," is designed to deal with unintentional harm.

Examples of unintentional harm might include wandering in the extreme cold, or putting oneself at serious risk for harm at the hands of others or through gross neglect.

If an officer brings a person in custody for an examination, the person may be held long enough for a physician to make an initial examination. If the doctor signs a Form 1, the person can then be detained in a psychiatric facility for up to 72 hours for an assessment.

Depending on the circumstances, the person may also be admitted as a voluntary or informal patient, or may be:

- Admitted, with his or her consent, as a voluntary patient;
- Admitted as an informal patient. (Informal admission is only permitted in limited circumstances and requires the consent of the person entitled to make treatment decisions for the person);
- Released; **or**
- The subject of a Community Treatment Order.

## BY ORDER OF A PHYSICIAN

The *Mental Health Act* gives physicians an important role in ensuring the safety of those suffering from a mental disorder, as well as the security of the wider public. The law gives every physician in Ontario the right to sign an Application for Psychiatric Assessment (also referred to as an "APA" or "Form 1").

The Form 1 authorizes the apprehension, detention and assessment of a person who meets the criteria in the Act. This procedure is designed to be used by all physicians including those who are not mental health specialists.

The assessment must take place in a hospital that is recognized as a psychiatric facility and can last for a maximum of 72 hours.

A physician may use two methods to issue a Form 1.

## Method One

A physician may sign a Form 1 if he or she has examined the person in the past seven days and has reasonable cause to believe that at least one of the criteria from **both** of the following two tests are met:

### TEST 1 *THE PAST/PRESENT TEST.*

The physician must have reasonable cause to believe that the person:

- Has threatened or is threatening to cause bodily harm to self; **or**
- Has attempted or is attempting to cause bodily harm to self; **or**
- Has behaved or is behaving violently towards another person; **or**
- Has caused or is causing another person to fear bodily harm from him or her; **or**
- Has shown or is showing a lack of competence to care for self.

### TEST 2 *THE FUTURE TEST.*

The physician must form an *opinion* as to whether the person is ***apparently* suffering from mental disorder** that will ***likely*** result in:

- Serious bodily harm to self; **or**
- Serious bodily harm to others; **or**
- Serious physical impairment of self.

The third ground, "serious physical impairment of self," is designed to deal with unintentional harm.

Examples of unintentional harm might include wandering in the extreme cold, or putting oneself at serious risk for harm at the hands of others or through gross neglect.

## Method Two

A physician may also issue a Form 1 if the following test is satisfied:

The physician examines the person and has reasonable cause to believe that the person:

1) Has previously received treatment for a mental disorder of an ongoing or recurring nature that, when not treated, will likely result in:

a) Serious bodily harm to the person; **or**

b) Serious bodily harm to another person; **or**

c) Substantial mental or physical deterioration of the person; **or**

d) Serious physical impairment of the person.

AND

The person has shown clinical improvement as a result of the treatment.

In addition, the physician must be of the opinion that the person:

2) Is apparently suffering from the same (or a similar) mental disorder as the one for which he or she previously received treatment.

AND

3) Given the person's history of mental disorder and current mental or physical condition, the person is likely to cause:

a) Serious bodily harm to self; **or**

b) Serious bodily harm to another person; **or**

c) The person is likely to suffer;

i) Substantial mental deterioration; **or**

ii) Substantial physical deterioration; **or**

iii) Serious physical impairment.

AND

4) The person is incapable, within the meaning of the *Health Care Consent Act*, of consenting to his or her treatment in a psychiatric facility and the consent of his or her substitute decision-maker has been obtained.

For both methods a physician does not have to be certain that "serious bodily harm," "serious physical impairment," or "substantial mental or physical deterioration" will result before signing the Form 1. This is a judgment call. Although this is a serious step, much less certainty and expertise is required at this preliminary stage than later in the process.

**The doctor may base his/her opinion on any combination of personal observations and information given by other people (professionals, family, community, etc.).**

In some cases the information that the doctor requires will come entirely from the examination. In other cases the examination may not provide all of the information

necessary and the doctor will rely on information provided by others for some or all of the necessary information. This is permissible so long as the examination has taken place as required. The doctor must indicate the basis for signing the form, and date and sign it

A physician may sign a Form 1 at any time within seven days of examining the person. This seven-day period includes the day of the examination.

Once the Form 1 is signed, a new seven-day period begins. For seven days after the physician signs the Form 1, anyone (usually a police officer) may take the person "in custody" to a Schedule 1 psychiatric facility. This seven-day period includes the day that the form was signed.

The law uses the words "take in custody" to clarify the authority to use reasonable force to take the person to a psychiatric facility if the person refuses to go voluntarily.

Once the person is brought to the psychiatric facility, the Form 1 allows the facility to detain, restrain, observe and examine the person for a period of up to 72 hours.

*Detention at a psychiatric facility under a Form 1 is a preliminary step for the purpose of determining whether involuntary status is appropriate. Under the Mental Health Act, involuntary status will only begin if and when a Certificate of Involuntary Admission (Form 3) is signed or the person is admitted on some other basis.*

## INDIVIDUALS COMING FROM OUTSIDE OF ONTARIO

If the Minister of Health and Long-Term Care has reasonable cause to believe that a person who suffers from a mental disorder of a nature or quality likely to result in serious bodily harm to self or others may be coming into the province, the Minister may make an order (Form 13). A Form 13 order may also be signed by other Ministry officials who have been given that authority by the Minister.

A Form 13 is not valid outside of Ontario. The Form 13 has the same legal effect as a Form 1 except that it is not subject to a seven-day time limit.

The person may be brought to a psychiatric facility for detention and assessment for a period of up to 72 hours.

# PART III:

## POLICE OFFICER'S DUTY AT THE FACILITY

The *Mental Health Act* states that a police officer who brings a person in custody to a psychiatric facility must remain at the facility and retain custody of the person until the facility has accepted custody of the person.

The regulations state that where a person is taken to a psychiatric facility under section 33 of the Act, the officer in charge of the facility or his or her delegate shall ensure that a decision is made as soon as is reasonably possible as to whether or not the facility will take custody of the person. Where a decision is made to take the person into custody, the designated staff member shall promptly inform the police officer or other person of the decision.

## THE ASSESSMENT

If the staff at the psychiatric facility wish, they may hold a person on a Form 1 (application by physician) or a Form 13 (regarding a person coming from outside the province) for up to 72 hours. According to the *Mental Health Act*, the staff may "detain, restrain, observe and examine" the person in the facility "for not more than 72 hours."

**Note: A person brought to the facility on the basis of a Form 2 may only be held long enough for a doctor to make an initial examination and decide whether a Form 1 is appropriate.**

After the detention period at the psychiatric facility has started, the attending physician is legally required to give the person a form that explains the reasons for the detention and the right to contact a lawyer (Form 42). The *Mental Health Act* specifically requires that the Form 42 be given in order to ensure compliance with the Charter of Rights. The Courts have stated that neglect of this obligation will usually make the detention unlawful.

During the detention period, the person will be assessed in order to decide on the next appropriate steps. Options include:

- Discharging the person without further action;
- Arranging for treatment or referral in the community;
- Admitting him or her as an involentary patient, a voluntary patient, or an informal patient or;
- Issuing or renewing a Community Treatment Order for the person.

A decision to admit the person as an involuntary patient may only be made by a physician other than the one who signed the Form 1. The process and criteria for signing a Certificate of Involuntary Admission (Form 3) are described below.

*The meaning of "informal patient" has changed over the years. See page 9 for an explanation of the term and a discussion of the limited circumstances in which informal admission is permitted.*

After the assessment is complete, the attending physician must release the person if THE ATTENDING PHYSICIAN is of the opinion that the person is not in need of psychiatric treatment.

### Release of Person by Officer in Charge

One of the above steps must be taken before the end of the 72-hour maximum detention period. If the person is still at the hospital at the end of the 72 hours and has not been admitted as an informal, involuntary or voluntary patient, the officer in charge of the psychiatric facility must, by law, release the person.

## INVOLUNTARY PATIENTS

An involuntary patient is a person held in a psychiatric facility under a Certificate of Involuntary Admission (Form 3) or a Certificate of Renewal (Form 4).

Involuntary status gives authority, subject to the rules in the *Mental Health Act*, to detain, restrain and examine the patient at a Schedule 1 psychiatric facility.

*The rules regarding consent to treatment apply to involuntary patients in the same way as they apply to all other patients.* Capable consent from the patient, or from a substitute if the patient is not capable, is required for non-emergency treatment. Psychosurgery, with or without consent, may not be performed on an involuntary patient.

### Certificate of Involuntary Admission (Form 3)

A person may be put on involuntary status (Form 3) only if he or she fits one of the following four categories:

- The person is currently being detained on an Application by Physician for Psychiatric Assessment (Form 1) and the maximum 72-hour detention period has not yet expired. The Form 3 may not be signed by

the same physician who signed the Form 1. This provides for a mandatory second opinion;

- The person is currently being detained on an Order to Admit a Person Coming into Ontario (Form 13) and the maximum 72-hour detention period has not yet expired;
- The person is an informal patient in a Schedule 1 psychiatric facility;
- The person is a voluntary patient (see Definitions, page 36) under the *Mental Health Act* in a Schedule 1 psychiatric facility.

Other individuals, for example those brought to hospital on a Form 2 from a Justice of the Peace, may not be placed directly on involuntary status. However, if it is appropriate in the circumstances, a Form 1 may be used in those situations.

A Form 3 is valid for up to two weeks, including the date that it is signed. For example, a Form 3 signed any time on a Tuesday will expire on the second Monday following, at midnight.

The legal requirements that must be met when signing a Form 3 are explained on page 14.

## Certificate of Renewal (Form 4)

A Certificate of Renewal (Form 4) is used to renew the involuntary status of a person already on a Form 3 or a previous Form 4. This process may be repeated as often as the attending physician feels is appropriate and the legal criteria are met. The patient must be examined and the new form completed before the previous form expires.

The first Form 4 is valid for up to one month. The second Form 4 is valid for up to two months and the third and each subsequent Form 4 is valid for up to three months. Each period includes the date of signature.

Most patients are kept on involuntary status for a period of days or weeks but some individuals are held as involuntary patients for many months or years. This is perfectly legal if all of the required procedures have been followed.

This system of renewals ensures frequent access to the Consent and Capacity Board for a review of a patient's involuntary status. A patient has the right to a hearing each time a new certificate is signed.

A patient's status is automatically reviewed by the Consent and Capacity Board after every fourth Form 4 is signed, even if the patient does not ask for the Board hearing. The right to this automatic review cannot be waived.

The legal requirements that must be met when signing a Form 4 are explained below.

**The legal requirements that must be met when signing a Certificate of Involuntary Admission (Form 3) or Certificate of Renewal (Form 4).**

### Method One

The attending physician shall complete a Certificate of Involuntary Admission or Certificate of Renewal if he or she examines the person and is of the opinion that:

1) The person is suffering from mental disorder of a nature or quality that, unless the person remains in the custody of the psychiatric facility, will likely result in:

a) Serious bodily harm to self; **or**

b) Serious bodily harm to another person; **or**

c) Serious physical impairment of self.

AND

2) The person is not suitable for admission as an informal or voluntary patient.

### Method Two

The attending physician shall complete a Certificate of Involuntary Admission or a Certificate of Renewal if he or she examines the patient and is of the opinion that the patient:

3) Has previously received treatment for a mental disorder of an ongoing or recurring nature that, when not treated, will likely result in;

a) Serious bodily harm to the person; **or**

b) Serious bodily harm to another person; **or**

c) Substantial mental or physical deterioration of the person; **or**

d) Serious physical impairment of the person.

AND

4) The person has shown clinical improvement as a result of the treatment.

AND

5) The person is suffering from the same (or a similar) mental disorder as the one for which he or she previously received treatment.

AND

6) Given the person's history of mental disorder and current mental or physical condition, the person is likely to cause:

a) Serious bodily harm to self; or

b) Serious bodily harm to another person; or

c) Is likely to suffer;

i) Substantial mental deterioration; or

ii) Substantial physical deterioration; or

iii) Serious physical impairment.

AND

7) The person has been found incapable, within the meaning of the *Health Care Consent Act*, of consenting to his or her treatment in a psychiatric facility and the consent of his or her substitute decision-maker has been obtained.

AND

8) The person is not suitable for admission or continuation as an informal or voluntary patient.

**The doctor may base his or her opinion on any combination of personal observations and information given by other people (professionals, family, community, etc.).**

In some cases the information that the doctor requires will come entirely from the examination. In other cases the examination may not provide all of the information necessary and the doctor will rely on information provided by others for some or all of the necessary information. This is permissible as long as the examination has taken place as required.

How a patient has behaved while under the Form 1, Form 3 or previous Form 4 may be important in deciding whether to sign the new form. However, inappropriate behaviour during this period is only one indicator of whether the criteria for involuntary status are met. Inappropriate behaviour is not always necessary in order for a Form 3 or Form 4 to be signed.

The physician signing a Form 3 or Form 4 must give the patient a written notice (Form 30), which states:

- That the person is an involuntary patient;
- The reasons for placing the patient on involuntary status; and
- That the person has the right to retain legal counsel and to contest the involuntary status by applying to the Consent and Capacity Board.

The physician must also inform the hospital rights adviser whenever a Form 3 or Form 4 is signed. The rights adviser will visit the patient, explain the situation and inform the person of the right to appeal the involuntary status to the Consent and Capacity Board. If the person wishes to appeal, the rights adviser must assist with the application and help to obtain legal services.

The officer in charge of the psychiatric facility, or his or her representative, must review each Form 3 and Form 4 immediately after it is completed. The purpose of this review is to determine if the form has been properly completed according to the criteria in the *Mental Health Act*. If not properly completed, the attending physician must be informed. The person must then be re-examined and either released or put on a new form. If this does not happen, the officer in charge must release the person.

## Change from Involuntary to Voluntary Status

If a Certificate of Involuntary Admission (Form 3) or Certificate of Renewal (Form 4) expires before the attending physician completes another certificate, the patient becomes a *voluntary* patient.

The attending physician may change the status of a patient at any time from involuntary patient to voluntary by completing a Form 5. The physician must note on the Form 5 the reason for changing the patient's status.

A patient should always be informed of a change to voluntary status.

A change from involuntary to voluntary status does not necessarily mean that the patient is ready to leave the facility. It may be that the attending physician believes that the patient no longer meets the legal test for involuntary status or that he or she is of the view that the patient has become an appropriate candidate for voluntary status.

A voluntary patient who is considering leaving the facility should discuss the matter with his or her attending physician before making any decision.

## CONFIDENTIALITY OF PSYCHIATRIC RECORDS IN A PSYCHIATRIC FACILITY

### Special Rules for Records in a Psychiatric Facility

The *Mental Health Act* has special rules regarding the information contained in a patient's clinical record. Legally, the clinical record includes all or part of a patient's record *compiled in a psychiatric facility*. These rules cover the records of inpatients, outpatients, and ex-patients.

### Where the Rules do not Apply

The rules described below govern the conditions under which a *psychiatric facility* may *disclose* information from a clinical record. The rules do not govern how the facility may *gather* information. For example, the *Mental Health Act* does not require consent in order to receive information from a family member of a patient who approaches staff.

The rules do not apply to records of institutions and individuals who do not fall under the *Mental Health Act*. For example, the rules in the *Mental Health Act* do not apply to counselling or health care records kept by institutions that are not part of designated psychiatric facilities.

### The General Rule is Non-Disclosure

Unless the law specifically allows it, it is strictly forbidden to disclose, transmit or examine a clinical record.

### When Disclosure of the Record is Permitted

The patient's attending physician and the officer in charge of the facility are allowed to see the record.

A lawyer who has been retained to represent a patient at a hearing of the Consent and Capacity Board is entitled to access the clinical record. No consent is required.

**A. Release of records with consent**

The officer in charge may disclose, transmit or permit the record's examination in any of the following circumstances:

- To any person with the consent of the patient, if the patient is considered to be competent for this purpose and has signed a consent form (Form 14);
- To any person with the consent of the appropriate substitute decision-maker, where the patient is not mentally competent, and the substitute decision-maker has signed a consent form (Form 14).

**B. Release of records without consent**

The officer in charge may disclose, transmit or permit the record's examination in any of the following circumstances:

- To any person employed in or on the staff of a psychiatric facility, but only for the purpose of the assessment or treatment of the patient;
- To the chief executive officer of another health facility currently involved in the direct health care of the patient. The chief executive officer of the treating facility must make the request in writing to the officer in charge;
- To a physician who is considering issuing or renewing, or who has issued or renewed a Community Treatment Order, or to a physician or other person named in a person's Community Treatment Plan as being involved in the person's treatment or care and supervision. The physician or other named person must make the request in writing to the officer in charge;
- In an emergency, to any person currently involved in the direct health care of the patient in a health facility. This provision applies where delay in obtaining consent would result in the patient experiencing severe suffering or would put the patient at risk of sustaining serious bodily harm;
- To the personal representative of a patient who has died;
- To a lawyer acting for the psychiatric facility or an employee of the facility;
- To a person determining capacity for treatment, admission to a care facility, or personal assistance services;
- To any person, for research, academic pursuits, or the compilation of statistical data. The patient's name and any other means of identification of the patient must be removed.

### Community Treatment Orders

**When consultation and sharing of information is permitted.**

As with a patient's clinical records, there is a general rule

of non-disclosure with respect to the fact that a person is subject to, or being considered for, a Community Treatment Order. The legislation provides that no person shall disclose the fact that a person is being considered for, or is subject to, a Community Treatment Order without the consent of the person or the person's substitute decision-maker.

Exceptions to the general rule of non-disclosure arise in the following two circumstances.

The *Mental Health Act* provides that a physician who is considering issuing or renewing a Community Treatment Order may consult with certain people. A physician may consult with a member of a regulated health profession, a member of the Ontario College of Social Workers or any other person to determine whether a Community Treatment Order should be issued or renewed.

As well, the *Mental Health Act* provides for the sharing of information between certain people for the purpose of treating, caring for and supervising a person who is subject to a Community Treatment Order. A member of a regulated health profession, a member of the Ontario College of Social Workers or any other person who is named in a Community Treatment Plan as participating in the treatment or care and supervision of a person subject to the order may share information with each other.

## Patient's own Access to Records

A person who is or was a patient in a psychiatric facility and who is mentally competent to do so, may examine or copy his or her clinical record. The person must make this request in writing (Form 28) and may be required to pay copying charges.

If the person is considered to be incompetent for records access, then his or her substitute decision-maker for that purpose is entitled to access instead of the patient. The substitute decision-maker must make this request in writing (Form 28) and may be required to pay copying charges.

The hospital must give the person access to the record unless it has received permission from the Consent and Capacity Board to withhold all or part of the record. Access may not be denied unless the Board has given its permission.

The application to the Board is made by the officer in charge on the advice of the attending physician. The application must be made within seven days of the request for access. The Board may only grant the request if it believes that disclosure will likely result in:

- Serious harm to the treatment or recovery of the patient while in the facility; or
- Serious physical or emotional harm to another person.

## Where the Patient Believes the Record is Wrong

If a patient believes there is an error or omission in the record, the patient may request a correction. If the request is not granted, the patient may require that a "statement of disagreement" reflecting the requested changes be attached to the clinical record.

## Access to Records and the Issue of Competence

Any person who is at least 16 years old and competent to do so, may appoint a representative for the purpose of records access. The representative may see the record and may give access to the record. The appointment must be made in writing in the presence of a witness. The attending physician must inform every patient of this right within the first 48 hours after the person is admitted or registered in the facility and must give him a Form 36 which provides further information.

The appointment of this representative may be made subject to terms and conditions. If the person is capable of doing so, he or she may revoke the appointment at any time. This must be done in writing.

An attending physician may determine that a person is incompetent to examine or permit the disclosure of his or her clinical record. If a finding of incompetence is made, access to the record will be handled by a substitute decision-maker on the person's behalf.

If the patient (when competent with regard to records) or the Consent and Capacity Board has appointed a representative, that person will make the decisions with respect to access to the clinical record. If no appointment has been made, the person who could make treatment decisions for the patient will also make decisions with regard to access to the clinical record.

Following the finding of incompetence, the physician must do the following:

- Give the person a Form 33, which explains the finding and the right to appeal it to the Consent and Capacity Board;
- Give the person a Form 40, which explains the right

to apply to the Board for the appointment of a representative to make decisions with regard to access to the clinical record;

- Inform the rights adviser, who will meet with the person.

The person may apply to the Consent and Capacity Board to challenge the finding of incompetence or to ask that a representative be appointed.

The Board will review the finding of competency or consider the application to appoint a representative in the same way that it deals with similar matters regarding capacity to consent to treatment, or the appointment of a representative under the *Health Care Consent Act*.

## Disclosure in Matters Before the Consent and Capacity Board

All parties to a hearing before the Consent and Capacity Board must be allowed to examine and copy any and all documents that will be used at the hearing. Parties must also be allowed to see and copy reports if the contents of the reports will be given in evidence, even if the report itself is not going to be shown to the Board. There are no exceptions to this rule. Under no condition may records or the contents of reports be used at the hearing if access to them has been denied.

Before the hearing, a person's lawyer (or other individual who will be representing the person at the hearing) is normally entitled to see and copy (at his or her expense) all of the person's medical and health records. If the person is at least 16 years old and capable with respect to accessing the record, he or she is also entitled to see and copy these materials. Under no condition may records or the contents of reports be used at a hearing if the person has been denied access to them.

However, a person may be denied access to his or her records in certain limited circumstances. There are special procedures under the *Child and Family Services Act* and the *Long-Term Care Act* that a doctor may use to limit a person's access to his or her records created under that Act. A person may also be denied access to records in a psychiatric facility or a long-term care facility if the hospital authorities have asked the Board for permission and the Board has given that permission.

It is against the law to deny access unless these procedures have been followed. Copies should be provided at nominal cost.

**(For more information about the Consent and Capacity Board, please see page 33.)**

## Disclosure in Court or to a Legal Body

The officer in charge of a psychiatric facility, or a person designated in writing by him or her, must disclose, transmit or permit the examination of a clinical record if required for a court matter or by some other legal body entitled to demand it.

However, if the attending physician states in writing that this disclosure is likely to harm the treatment or recovery of the patient, or harm a third person (physically or mentally) the court or other legal body will hold a closed hearing. It may not order disclosure unless satisfied that it is essential in the interests of justice.

No one is permitted to disclose before any court or other legal body any information obtained in the course of assessing or treating a patient in a psychiatric facility unless:

- The person is mentally competent and consents; **or**
- The incompetent person's substitute decision-maker consents; **or**
- The court or other legal body holds a hearing and determines that disclosure of the record is essential in the interests of justice. This hearing must be held on notice to the person or the substitute decision-maker.

This rule does not apply if the legal action was started by a person with regard to his or her treatment in a psychiatric facility.

## Providing Information to the Public Guardian and Trustee

The Public Guardian and Trustee has the responsibility of investigating allegations that a person is incapable with respect to property or personal care, and that serious harm is occurring or may occur as a result. Allegations and information directed to the Public Guardian and Trustee for this purpose are exempted from all of the restrictions described above.

## Disclosure to a Coroner

A coroner investigating a death may, in appropriate circumstances, view or copy records relating to a person who has died.

## RIGHTS ADVICE FOR PATIENTS

Every psychiatric facility must have one or more rights advisers.

### When Rights Advice is Required in a Psychiatric Facility

The physician in a psychiatric facility must promptly notify both the patient and a rights adviser each time:

- A Certificate of Involuntary Admission or Certificate of Renewal is signed;
- A patient is found incompetent to examine a clinical record or to give or refuse consent to its disclosure to others;
- An informal patient between the ages of 12 and 15 has the right to apply for a review of his or her informal status;
- A Certificate of Incapacity to manage property or a Certificate of Continuance is signed.

When the rights adviser is notified by a physician, he or she is required to promptly meet with the person to explain the significance of the issue and the right to have it reviewed by the Consent and Capacity Board. If the patient wishes, the rights adviser must assist in making an application to the Board and obtaining legal services.

The patient has the right to refuse to meet with the rights adviser.

### Rights Advice with Regard to Capacity to Consent to Treatment for a Psychiatric Disorder for a Person in a Psychiatric Facility

With some exceptions, the rules described above also apply when a physician determines that a patient is incapable with regard to a treatment that has been proposed for a psychiatric disorder.

The exceptions are as follows:

- The patient is less than 14 years old;
- The patient has a court-ordered guardian of the person appointed under the *Substitute Decisions Act* with the authority to give or refuse consent to the treatment;
- The patient has a valid Ulysses Contract (see page 29) with a provision waiving the person's right to apply to the Consent and Capacity Board for a review of the Finding of Incapacity effective under the *Substitute Decisions Act;*
- The patient refuses to meet the rights adviser or is unconscious, semi-conscious or unable to communicate comprehensibly despite reasonable efforts to understand the person;
- The physician believes that there is an emergency (see Emergency Treatment, page 23);
- Rights advice has already been provided during this admission following a Finding of Incapacity with respect to any proposed treatment for a mental disorder.

### Rights Advice with Respect to Community Treatment Orders

Before a physician issues or renews a Community Treatment Order, he or she must be satisfied that the person subject to the order and his or her substitute decision-maker, if any, have consulted with a rights adviser and have been advised of their legal rights.

The person subject to the order has the right to refuse to consult with a rights adviser. If this occurs, the rights adviser should inform the physician.

## RESTRAINT

The legal rules known as "common law" require a caregiver to restrain or confine a person when immediate action is necessary to prevent serious bodily harm to the person or to others.

This means that physical, mechanical or chemical means may be used in an emergency to place a person under control when necessary to prevent serious bodily harm to self or to others. Only the minimum amount of restraint reasonable in the circumstances is allowed. This is based on the physical and mental condition of the person.

The consent of the patient or that of the substitute decision-maker is not needed for emergency restraint, however, extensive documentation is required.

The use of restraint on a patient in a psychiatric facility must be clearly documented in the patient's clinical record. The statement in the clinical record must note:

- The patient was restrained;
- A description of the means of restraint; and
- A description of the behaviour of the patient that required that he or she be restrained or continue to be restrained.

In addition, when a chemical restraint is used, the statement in the clinical record must include a statement of:

- The chemical employed;
- The method of administration; and
- The dosage.

The restraint rules set out above apply to all patients in psychiatric facilities, whether or not their restraint is specifically authorized in the *Mental Health Act*.

## COMMUNICATION TO AND FROM PATIENTS

The general rule is that no communication written by or sent to a patient may be opened, examined or withheld. Its delivery must not be interfered with or delayed.

The officer in charge, or a person acting under his or her authority, does have the authority to open and inspect the contents of any communication that he or she has reasonable cause to believe:

- If written by the patient, it would prejudice the patient or be unreasonably offensive to the recipient;
- If sent to the patient, it would interfere with the patient's treatment or cause the patient unnecessary distress.

In these situations, the officer may stop the communication from being delivered or examined.

However, under no circumstances may communication written by a patient to a lawyer, the Ontario Ombudsman, a member of the Consent and Capacity Board or a member of the Legislature be opened, examined or withheld.

Communications from a lawyer, a member of the Consent and Capacity Board, or a member of the Legislature to a patient may not be opened, examined or withheld.

## TRANSFER OF PATIENTS

The officer in charge, with the advice of the attending physician, may transfer a patient from one psychiatric facility to another. A memorandum of transfer must first be completed (Form 10). The power to detain the patient continues in the new facility.

If the attending physician advises the officer in charge that a patient requires treatment that is not available in the psychiatric facility, the patient may be transferred to a public hospital for that treatment. In this situation, the senior administrator of the public hospital has the same powers of custody and control of the patient as an officer in charge of a psychiatric facility.

The Minister of Health and Long-Term Care may authorize the transfer of a patient to an institution outside of Ontario (Form 12) if another jurisdiction has responsibility for the patient's hospitalization or if it is in the patient's best interests to be hospitalized in another jurisdiction.

## PSYCHOSURGERY

Psychosurgery is not permitted in Ontario unless a person is a voluntary patient and has given valid, voluntary, informed consent.

Ontario has one set of rules for consent to treatment. These rules are found in the *Health Care Consent Act* and apply to treatment of all types no matter where the treatment is given. These rules also apply to psychiatric treatment both inside and outside of the hospital and are the same for all patients including involuntary and informal patients.

## WHEN THE *HEALTH CARE CONSENT ACT* DOES NOT APPLY

Certain types of medical procedures are specifically excluded from the *Health Care Consent Act.*

Consent with regard to the following procedures is governed by the general rules known as "common law:"

- A procedure whose primary purpose is research;
- The removal of tissue for purposes such as organ transplant.

Sterilization that is not medically necessary for the protection of the person's health is also excluded from the *Health Care Consent Act.* Common law does not permit this procedure to be performed. It is, therefore, illegal in Ontario to perform a sterilization that is not medically necessary for the person's health unless:

- The person is mentally capable of giving consent; and
- The person has given informed, voluntary consent.

## CONSENT

**Treatment requires informed, capable, voluntary consent.**

*With the exception of certain emergency situations, all treatment requires informed, capable, voluntary consent.* If capable, the patient makes the decision. If the person is not capable, the decision is made on his or her behalf by a substitute decision-maker.

The law allows the health practitioner proposing the treatment to deal with consent in any one of the following three ways:

- The practitioner may decide to obtain consent each time an individual treatment is administered;
- The practitioner may choose to consider an entire course of treatment as one treatment for the purpose of obtaining consent;
- The practitioner may put together a plan of treatment for the patient and deal with the entire plan of treatment as one treatment for the purpose of obtaining consent. A plan of treatment is a plan developed by one or more health practitioners that deals with one or more of the patient's current health problems, or health problems *that the patient is likely to have in the future given his or her current condition.* The plan must provide for various treatments and may also allow for the withholding or withdrawal of treatment in light of the person's current health condition.

### The Meaning of Consent

Valid consent does not mean a signature on a piece of paper. For consent to be valid, it must be informed and be given voluntarily by a capable person. Consent may be oral or written; expressed or implied.

Informed consent means that the health practitioner has given information that a reasonable person would need to make the decision and has answered any questions. The consent must not be obtained through misrepresentation or fraud.

Unless it is unreasonable in the circumstances, a health practitioner may presume that a consent to a treatment includes:

- Consent to variations or adjustments in the treatment if the nature, expected benefits, material risks and material side effects of the changed treatment are not significantly different from the original treatment;
- Consent to the continuation of the same treatment in a different setting if there is no significant change in the expected benefits, material risks or material side effects as a result of the change in setting.

Consent may be withdrawn at any time by a person who is capable of doing so. A person who is capable of consenting to a treatment is considered to be capable to withdraw the consent. A person who becomes capable after a treatment starts is entitled to take over the decision-making from the substitute decision-maker.

## EMERGENCY TREATMENT

There is an emergency when a person is apparently experiencing severe suffering or is at risk of sustaining serious bodily harm if treatment is not administered immediately.

A health practitioner may treat without consent in the following emergency situations unless the practitioner has reasonable grounds to believe that the person, while capable and at least 16 years old, expressed a wish to refuse consent to the treatment:

- The person appears to be capable but cannot communicate with the health practitioner because of a language difference or a disability. Reasonable steps must be taken to find a practical means to communicate before treatment begins. The treatment may only continue for as long as necessary to enable communication. Treatment may only be given if there is no reason to believe that the person does not want the treatment;
- The patient is incapable, a substitute is not available and any delay in finding the person's substitute decision-maker would prolong the person's suffering or put the person at risk of serious bodily harm. Treatment may only continue as long as necessary to receive a decision from the substitute decision-maker;
- The substitute decision-maker refuses to consent to the person's treatment and the practitioner is of the opinion that the substitute decision-maker has not followed the decision-making rules found in the *Health Care Consent Act*. These rules are discussed on page 26.

## CAPABLE OF CONSENTING TO TREATMENT

*Capable individuals make their own treatment decisions.*

A person is capable of making decisions about a treatment if able to understand the information relevant to making a decision about the treatment and able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

Some people are incapable of consenting to one treatment, yet capable of consenting to others. A person may be incapable of consenting to a treatment at one time but capable at another.

A person is presumed to be capable of making a treatment decision unless there are reasonable grounds to believe that the person is incapable.

***Even if a person is willing to have a treatment, a health practitioner may not presume that he or she is capable of consenting to the treatment when it is unreasonable to do so.***

## INCAPABLE OF CONSENTING TO TREATMENT

An incapable person cannot provide valid consent.

A health practitioner who is proposing a treatment may determine that the person is incapable of making decisions about the treatment. The decisions must then be made by the proper substitute decision-maker.

A person does not become incapable only because a health practitioner does not speak his or her language or has other difficulties in communicating with the patient. The health practitioner is obliged to take the steps necessary to establish communications.

### Obligations Regarding Findings of Incapacity

*The law requires that all health practitioners who make Findings of Incapacity with respect to proposed treatments provide certain information to their patients. This requirement applies to all types of treatment in all settings.*

Each health profession in Ontario has guidelines on what information is to be given by its members. Generally speaking, these guidelines require that the practitioner explain that:

- Treatment is needed;
- Certain decisions are required;
- The patient is not in a position to make those decisions; and
- A particular person will be asked to make the decisions for the patient.

If the patient expresses concern or opposition, the health practitioner must also explain to the person that he or she has the right to apply to the Consent and Capacity Board to review the Finding of Incapacity or to have another substitute decision-maker appointed. The practitioner must also assist with the application.

If a health practitioner finds a patient in a psychiatric facility incapable of consenting to a treatment for a mental disorder, both the patient and a rights adviser must be notified. There are certain exceptions to this rule. (Please see page 21 for further information.)

### Review of a Finding of Incapacity

Most persons found incapable of consenting to treatment may apply to the Consent and Capacity Board for a review.

In some circumstances a person may be deemed to have applied for a review of his of her capacity without actually filing an application for a capacity hearing.

A review is not permitted if:

- The person has a court-appointed guardian with authority to make the decision;
- The person has made a valid Ulysses Contract containing words waiving the right to a hearing;
- The hearing process regarding a Finding of Incapacity for the same or a similar treatment was completed less than six months before. The person may ask the Consent and Capacity Board to allow a hearing in these circumstances if there has been a material change in circumstances.

### Situations Where Treatment may not be Started

Except in an emergency, treatment of an incapable patient may not begin if the practitioner is informed that:

- The patient plans to apply to the Consent and Capacity Board for a review of the Finding of Incapacity. *(This does not apply if the patient is not entitled to bring the application.* See above);

**OR**

- The patient or another person plans to apply for the appointment of a representative.*(This does not apply if the patient has a court-appointed guardian or attorney for personal care with authority to make the decision.)*

The treatment may not begin until:

- A further 48 hours passes without an application being made;

**OR**

- The application is withdrawn.

If the Board issues its decision and the practitioner is informed that one of the parties intends to appeal to the courts, treatment may not start until:

- Seven days from the time of the Board's decision passes without an appeal being made;

**OR**

- The entire appeal process is completed.

The health practitioner may ask the court to allow treatment pending an appeal.

The above restrictions prevent treatment from being started in certain situations. The restrictions do not, however, apply to treatments that have already started.

## SUBSTITUTE DECISION-MAKING FOR TREATMENT

Capable people are entitled to make their own treatment decisions. When a person has been found *incapable* of consenting to a treatment, a substitute decision-maker must make these decisions.

The *Health Care Consent Act* sets out a list of potential substitute decision-makers. The highest ranking person on this list who is available, capable and willing to make the decision is the substitute decision-maker for the incapable person for that particular decision.

A person is available if it is possible, within a reasonable time, to communicate with the person to obtain consent or refuse a treatment.

It is up to the health practitioner to decide if a potential substitute decision-maker is incapable of making the required decision. If this happens, the health practitioner must go to the next person on the list. There is no appeal from the opinion of the practitioner.

### Potential Substitute Decision-Makers

May include:

- A guardian of the person (if the guardian has the authority to make the required decision);
- An attorney for personal care (if the power of attorney document gives authority to the attorney to make the required decision);
- A representative appointed by the Consent and Capacity Board (if the representative has the authority to make that decision);
- A spouse, common law-spouse or partner;
- Children and parents (including a children's aid society or other person lawfully entitled to make treatment decisions instead of a parent);
- Brothers and sisters;
- Any other relative by blood, marriage or adoption.

A substitute decision-maker must be at least 16 years old, unless the patient is his or her child.

Custodial parents rank ahead of non-custodial parents.

A parent barred by court order or separation agreement from seeing the child or making his or her treatment decisions may not participate in treatment decisions.

Two persons are not considered to be spouses if they are living separate and apart as defined in Canada's divorce law.

Two persons are common-law spouses if they are of the opposite sex, and they live as man and wife but are not married and one of the following applies to them:

- They have lived together for at least a year;
- They are the parents of a child;
- They have made a legal cohabitation agreement under the *Family Law Act*.

Two persons are considered to be partners if they have lived together for at least a year and have a close personal relationship that is of primary importance in both of their lives.

The Public Guardian and Trustee is required to make treatment decisions in the following two situations:

- If no other qualified person is available and willing to act;
- If there are two or more qualified substitute decision-makers of equal rank who are giving conflicting direction to the health practitioner.

## Rules for Making Treatment Decisions

The substitute decision-maker must follow the rules explained below.

## Prior Capable Wishes

Every person has the right to expect that his or her capable wishes will be respected.

A substitute decision-maker must follow a person's *most recent* capable wishes if:

- The wish was expressed when the person was at least 16 years old;
- The wish is applicable to the circumstances; and
- It is not impossible to comply with the wish.

Binding wishes may be expressed in a power of attorney, in any other written form, orally or in any other way.

A substitute decision-maker or a health practitioner who proposed a treatment and who is unsure about the nature or validity of an incapable person's prior wishes may apply to the Consent and Capacity Board for directions (Form D*).

The Consent and Capacity Board also has a very limited authority to allow a substitute decision-maker to depart from prior capable wishes. If the Board concludes that the result of a treatment is significantly better than was anticipated at the time the capable wish was expressed and that the person would, if capable, likely consent (Form E*) the Board may give permission to depart from the prior capable wishes. The Board may also allow the health practitioner who proposed the treatment to apply to obtain permission for the substitute decision-maker to consent to the treatment.

## Best Interests

If there are no binding prior capable wishes, a substitute must act in the incapable person's best interests. In deciding whether a treatment is in the best interests of the incapable person, the substitute decision-maker must consider all of the following things:

- The values and beliefs that the substitute knows the incapable person held when capable and believes that he or she would still act on if capable;
- Any non-binding wishes expressed by the incapable person. (This would include, for example, wishes expressed before age 16, or when the person was incapable.);
- If the proposed treatment is likely to:
  1) Improve the incapable person's condition or well-being;
  2) Prevent the incapable person's condition or well-being from deteriorating;
  3) Reduce the extent to which, or the rate at which, the incapable person's condition or well-being is likely to deteriorate;
  4) Whether the incapable person's condition or well-being is likely to improve, remain the same or deteriorate without the treatment;
  5) Whether the benefits the incapable person is expected to obtain from the treatment outweigh the risk of harm to her or him;
  6) Whether a less restrictive or less intrusive treatment would be as beneficial as the proposed treatment.

## Failure to Follow the Decision-Making Rules

If the health practitioner believes that the substitute decision-maker is not following these decision-making rules, he or she may apply to the Consent and Capacity Board (Form G*) to direct the substitute decision-maker to comply. Failure to comply with the decision of the Board will result in the substitute decision-maker being replaced.

(*For Forms B, C, D, E and G, whenever an application of this kind is submitted the law provides that the patient is deemed to have applied for a review of his or her capacity to make the relevant decision. This does not apply if the Board has determined this issue of capacity within the previous six months.)

## Admission for the Purpose of Treatment

In some cases a substitute decision-maker who consents to a person's treatment may also consent to the person's admission to a hospital or psychiatric facility for the purpose of the treatment. (Please see page 9, Informal Admission, for further information.)

There may be situations where an incapable person expressed wishes with respect to his or her admission to a care facility and those prior wishes are unclear. A substitute decision-maker or the person responsible for authorizing admissions to a care facility may apply to the Consent and Capacity Board for directions about the nature or validity of the person's wishes with respect to admission.

# PART V:

## POWER OF ATTORNEY

### A Few Words About Language

- A "power of attorney" is a document, not a person
- The person making a power of attorney is called the "grantor"
- The person given authority in a power of attorney is called the "attorney"
- In Canada, the word "attorney" does not mean lawyer.

A power of attorney is a very powerful type of legal document that one person can use to grant another person or persons authority to make important decisions on his or her behalf. There are three different types of powers of attorney that may be made in Ontario.

There are some restrictions on who may grant a power of attorney and who may be an attorney. There are also strict legal rules that attorneys must follow. These rules govern the conduct of attorneys and describe the records that the attorney must keep. Anyone becoming an attorney for either property or personal care should become familiar with and follow these rules.

Blank power of attorney forms are available from a number of sources. However, powers of attorney are powerful and important documents. It may be a good idea to get professional assistance when making or signing one.

Nursing homes and homes for the aged *may not demand* that a power of attorney be signed as a condition of service or admission.

Powers of attorney are very powerful legal documents. A person considering a power of attorney should only give authority to a person in whom he or she has full confidence. If in doubt it may be better not to make a power of attorney. No one should be pressured to sign a power of attorney.

Attorneys are required to follow strict rules of conduct. These rules are outlined in the *Substitute Decisions Act.* Anyone acting as an attorney for personal care or property should become familiar with and follow these rules.

### Power of Attorney for Personal Care

A power of attorney for personal care allows a person (called the grantor) to:

- Name one or more substitute decision-makers (known as attorneys for personal care) to make personal care decisions for the grantor; and
- Give written instructions about particular kinds of decisions.

Depending on the wording, an attorney for personal care may be authorized to make decisions about any or all of the following:

- Health care, nutrition, shelter, clothing, hygiene, and safety.

A power of attorney for personal care only comes into effect if the grantor becomes incapable of making a particular decision.

If the decision required is one covered by the *Health Care Consent Act* (treatment, admission to a nursing home or home for the aged, or personal assistance service in a nursing home or home for the aged), the authority passes to the attorney for personal care when the grantor has been found incapable under the *Health Care Consent Act.* Until that happens, the grantor continues to make his or her own decisions.

The grantor may specify how his or her capacity is to be determined for personal care decisions that do not fall under the *Health Care Consent Act.* If nothing is specified, it comes into effect when the attorney for personal care decides that the person who has made the power of attorney is incapable of making the required decision.

In order to be legally capable of making a power of attorney for personal care, the grantor must:

- Have the ability to understand whether the proposed attorney has a genuine concern for the grantor's welfare; and
- Appreciate that it may be necessary for the attorney to make decisions on his or her behalf.

This test is different from the test used to decide if someone is capable of making personal care decisions. *There are many people who are considered to be capable of making a power of attorney for personal care even though they are legally incapable of making their own personal care decisions.*

The grantor may include specific directions with regard to what decisions are to be made or how decisions are to be made. Directions of this sort are known as "prior capable wishes." It is not possible, however, to include prior capable wishes if the grantor is not legally capable of decision-making in the relevant area.

Prior capable wishes may be given orally, included in a power of attorney at the time of the signing of the

document, or included in some other written document, or expressed in some other manner. Although it is not required, it is a good idea to put prior capable wishes in a written document.

The latest prior capable wish, written or not, is binding on a person making substitute decisions under the *Health Care Consent Act* or personal care decisions under the *Substitute Decisions Act*. To make a binding prior capable wish a person must be at least 16 years old and be legally capable of making decisions of that type.

Prior capable wishes are sometimes referred to as "advance directives" or "living wills."

## Ulysses Contract

Some people worry that they will resist necessary care if they become incapable. In order to deal with this problem, the *Substitute Decisions Act* creates a particularly powerful type of power of attorney for personal care. This is often referred to as a "Ulysses Contract."

A Ulysses Contract may contain a number of special provisions including clauses allowing for the use of necessary and reasonable force to facilitate the person's hospitalization and treatment.

Because a Ulysses Contract is so powerful, there are strict rules that must be followed when it is made. Failure to follow these rules will make the Ulysses Contract invalid. For this reason, professional advice is strongly recommended for anyone wishing to create a Ulysses Contract.

## Continuing Power of Attorney for Property

A continuing power of attorney for property gives the attorney the authority to deal with the property and money of the grantor.

In order to make a continuing power of attorney for property, the grantor must:

- Know the kind and value of his or her property;
- Be aware of obligations to dependents;
- Know that the attorney will have the power to do whatever the grantor could do with his or her property, except make a will (subject to restrictions and conditions set out in the power);
- Know that the attorney must account for his or her dealings;
- Know that, while capable, he or she may revoke the power at any time;
- Know that, unless managed prudently, the value of his or her property may decline; and
- Know that it is possible that the attorney could misuse the authority.

The person making a continuing power of attorney for property may include special provisions directing the decisions of the attorney and specifying when or under what conditions the power of attorney comes into effect. *If this is not specified, the attorney has authority to act at any time once the document is signed.*

The person making the power of attorney may choose to give authority over all of his or her property, or may decide to give the attorney only responsibility for certain property. However, careful thought should be given before restricting the scope of the attorney's authority. Restrictions can affect the attorney's right to replace the Public Guardian and Trustee, should that office become involved.

A continuing power of attorney for property remains in effect even if the person who signs it becomes incapable.

## General Power of Attorney for Property

A general power of attorney for property is only valid when the grantor is capable of managing his or her own property. It becomes invalid during any period when the grantor is incapable of managing property. For this reason, this type of power of attorney is not useful for people wishing to plan for their incapacity. This type of power of attorney is traditionally used for business or travel purposes.

# REPRESENTATIVES APPOINTED BY THE CONSENT AND CAPACITY BOARD

Under certain circumstances, the *Health Care Consent Act* gives the Consent and Capacity Board the power to appoint someone as the representative of an incapable person to make decisions about treatment.

Applications for the appointment of a representative can occur in two ways:

- The incapable person may apply to the Consent and Capacity Board to have a specific person named as representative (Form B*);
- A person may apply to the Consent and Capacity Board to have him or herself named as representative for an incapable person (Form C*).

(*See page 27 or page 42.)

The Consent and Capacity Board may choose either to appoint the proposed representative, appoint a different representative, or refuse to appoint a representative. The Board may place restrictions or conditions on the appointment and may amend or revoke the appointment at any time.

A representative may not be appointed if the incapable person already has an attorney for personal care or a guardian of the person.

## STATUTORY GUARDIANSHIP FOR PROPERTY

Under the *Substitute Decisions Act*, a person is incapable of managing property if unable to understand information relevant to making a decision in the management of his or her property, or unable to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

A Statutory Guardianship for property is created under a special process that does not require a court order. A Statutory Guardian manages a person's property if that person becomes incapable of doing so on his or her own. A Statutory Guardian may make any decision about property that the person could, if capable, with the excepition of making a will.

The Statutory Guardian will initially be the Public Guardian and Trustee. A person's spouse, partner, relative, attorney for property or a trust company nominated by a spouse may apply to take over from the Public Guardian and Trustee.

*Statutory Guardianship only exists with respect to property. There is no equivalent procedure for personal care.*

There are two ways someone may come to have a Statutory Guardian.

### Method One: Available in any Setting

A professional assessor may be asked to visit any person who does not have a continuing power of attorney for property for all of the person's property. The purpose of the visit is to determine if the person is capable of managing property or if a guardian may be appointed to do so. The request for the assessment usually comes from family members or caregivers.

A person has the right to refuse the assessment. Before the assessment begins, the law requires the assessor to tell the person:

- The purpose of the assessment;
- What will happen if the assessor decides that the person is incapable of managing property; and
- That the person has the right to refuse to be assessed. (The assessment may not be refused if it has been ordered by a court.)

An assessor is a member of a defined list of helping professions who is specially qualified and whose name appears on the list of recognized assessors. Assessors are usually in private practice and charge a fee to the requestor for their services. If the assessor finds the person incapable, the Public Guardian and Trustee becomes the person's Statutory Guardian.

The Certificate of Incapacity issued by an assessor operates indefinitely unless it ends in one of the circumstances described below.

The incapable person has the right to be reassessed at any time. The Statutory Guardian may be called on to assist in this, but is only required to assist once every six months. The assessor may confirm the previous Finding of Incapacity or inform the Public Guardian and Trustee that the person is now capable. This ends the Statutory Guardianship.

The person can appeal the Finding of Incapacity to the Consent and Capacity Board once every six months. A hearing may not be held unless there is an assessment or reassessment less than six months old.

The Statutory Guardianship ends in the following circumstances:

- A court-appointed guardian of property is named;
- An assessor reassesses the person and notifies the Public Guardian and Trustee that the person is capable of managing property;
- The Statutory Guardian resigns (by notifying both the incapable person and the Public Guardian and Trustee) and the Public Guardian and Trustee does not choose to take over as Statutory Guardian;
- The Consent and Capacity Board determines that the person is capable of managing property and the decision is not appealed within the allowable time;
- A decision of the Consent and Capacity Board is appealed and the court determines that the person is capable of managing property;
- A court terminates the Statutory Guardianship at the incapable person's request;
- The incapable person dies.

## Method Two: For Inpatients in a Psychiatric Facility

When a person is admitted to a psychiatric facility, a physician must examine the person to determine if he or she is capable of managing property. The attending physician may also conduct an assessment at any other time during the admission.

The physician determining capacity to manage property must enter the finding and the reasons for it in the clinical record.

If the physician finds the patient incapable, a Certificate of Incapacity (Form 21 under the *Mental Health Act*) is completed. This certificate is sent to the Public Guardian and Trustee who then becomes the patient's Statutory Guardian for property. A notice is also sent to the patient and a rights adviser. The person has the right to challenge this Finding of Incapacity before the Consent and Capacity Board once in any six-month period.

As long as the admission continues, a physician is free at any time to examine the patient and revoke the Statutory Guardianship. A physician's finding of incapacity to manage property will end when the patient is discharged, unless:

- The attending physician has examined the person's capacity to manage property within 21 days before discharge and found the person incapable of managing property; and
- A Notice of Continuance (Form 24 under the *Mental Health Act*) was issued to the patient and the Public Guardian and Trustee before the patient's discharge.

If a Notice of Continuance is signed before discharge, the Statutory Guardianship continues indefinitely after the person is discharged from the hospital. It then becomes the same as a Statutory Guardianship created by an assessor.

When this occurs, the person has the same rights for reassessment and review by the Consent and Capacity Board as referred to above and the Statutory Guardianship will come to an end in the same circumstances. There is, however, one important difference; the person may request a reassessment from either a capacity assessor or a physician who has the right to sign a Form 21 in a psychiatric facility.

## Rights and Powers of the Statutory Guardian

A Statutory Guardian has all the rights and powers over the person's property that the person would, if capable, with the exception of making a will for the person.

## Replacing the Public Guardian and Trustee as Statutory Guardian

If an incapable person has an attorney for property under a power of attorney signed before the Finding of Incapacity, the attorney can automatically replace the Public Guardian and Trustee as the substitute decision-maker. To do so, the person must present a valid continuing power of attorney for property to the Public Guardian and Trustee and undertake in writing to act according to it. The power of attorney must grant authority over all of the person's property.

A trust company nominated by a spouse, or the incapable person's spouse, partner or relative may apply to the Public Guardian and Trustee to take over as Statutory Guardian. The Public Guardian and Trustee may impose certain conditions on the transfer. (This option is also available to attorneys for property under a power of attorney for property that does not grant authority over all of the person's property.)

# COURT-APPOINTED GUARDIANSHIP

Anyone may apply to the Superior Court of Justice to be named as a person's guardian. A guardianship order will only be considered if incapacity is proven and the Court is satisfied that there is no less restrictive way of dealing with the person's needs.

There are two types of Court-appointed guardianships: guardianship for property and guardianship for personal care.

Not all guardianship orders are the same; the judge may grant different powers depending on the circumstances.

Depending on the exact wording of the order, a Court-appointed guardian of property may be permitted to take all actions with regard to the person's property, with the exception of making a will.

Again, depending on the wording of the order, a Court-appointed guardian for personal care may have authority in the areas of health care, nutrition, shelter, clothing, hygiene, and safety.

The judge may make an order for full guardianship for personal care, which gives wide authority including custodial power over the person, and authority to determine living arrangements and provide for shelter and safety.

A paid caregiver may not be appointed as a guardian unless there is no other suitable person available.

The procedure to obtain a guardianship order is generally complex. Professional legal assistance is highly recommended.

Guardians are required to follow strict rules of conduct. These rules are outlined in the *Substitute Decisions Act*. Anyone obtaining a guardianship order should become familiar with and follow these rules.

# PART VI:

The Consent and Capacity Board hears and decides cases under the *Mental Health Act*, the *Substitute Decisions Act*, the *Health Care Consent Act* and the *Long-Term Care Act*. It is an independent tribunal affiliated with the Ministry of Health and Long-Term Care.

The Board has regional offices around the province. Each office is headed by a Regional Vice-Chair. Most hearings are held in hospitals or nursing homes. A series of information sheets describing the Board and its authority can be obtained by calling any regional office of the Board or the Ministry of Health and Long-Term Care Infoline at (416) 327-0427 or 1-888-668-4636.

The Board sits in panels of one, three or five members. In cases involving an involuntary committal or an informal admission of a child between the ages of 12 and 15, the panel must have at least one lawyer, one psychiatrist and one community member.

## JURISDICTION

Under the *Mental Health Act* the Board may:

- Review involuntary status (Forms 16 and 17);
- Review whether a young person (aged 12 to 15) requires observation, care and treatment in a psychiatric facility (Form 25);
- Review a finding of incompetence to access or allow others to access a clinical record (Form 31);
- Consider the appointment of a representative for access to, or disclosure of, records (Form 41);
- Consider a request from a psychiatric facility to withhold access to a clinical record (Form 29);
- Inquire into whether the criteria for issuing or renewing a Community Treatment Order are met (Form 48).

Under the *Mental Health Act* and the *Substitute Decisions Act*, the Board may:

- Review a Finding of Incapacity to manage property (Form 18).

Under the *Health Care Consent Act*, the Board may:

- Review the capacity of a person to consent to his or her own treatment, admission to a care facility or a personal assistance service (Form A*);
- Consider the appointment of a representative to make decisions for an incapable person about treatment, admission to a care facility or a personal assistance service (Forms B* and C*);
- Consider a request to amend or terminate the appointment of a representative (Form H*);
- Review the decision of a substitute decision-maker to consent to the admission of an incapable person to a hospital or psychiatric facility for the purpose of treatment (Form F*);
- Consider a request from a substitute decision-maker or health practitioner for directions to the substitute decision-maker regarding prior capable wishes (Form D*);
- Consider a request from a substitute decision-maker for authority to depart from prior capable wishes (Form E*);
- Review a substitute decision-maker's compliance with the rules for substitute decision-making (Form G*).

(*See page 27 or page 42.)

Under the *Long-Term Care Act*, the Board may:

- Review an application by a care facility to withhold a resident's personal record;
- Consider an order directing a service provider to give a resident access to his or her personal record.

## PROCEDURE AT THE BOARD

The hearing must start within seven days after the day the Consent and Capacity Board receives written notice of the request for the hearing. This time can be extended if agreed to by all parties.

The law automatically specifies who is a party before the Board for each type of hearing. The Board also has the authority to name additional parties when appropriate. Anyone can attend a hearing and ask to be made a party.

All the parties before the Consent and Capacity Board have the right to participate fully. This includes the right, prior to the hearing, to review and copy documents to be used at the hearing, the right to attend the hearing, call evidence, cross-examine witnesses and make submissions.

Rights are somewhat more limited in the case of a hearing to determine whether the facility should be given authority to withhold access to all or part of a person's record. There is no appeal from a decision of the Board regarding access to records.

Within one day after the Consent and Capacity Board completes a hearing, the Board must make a decision and inform all parties of that decision. Parties have 30 days from the day of the hearing to request written reasons for the decision. Once a request has been received, reasons must be delivered within two business days.

## APPEAL RIGHTS

Decisions of the Consent and Capacity Board may be appealed by any party to the Superior Court of Justice. An appeal must be commenced by Notice of Appeal within seven days after receiving the Board's decision.

Appeals must be made under the rules of the Court. There are no ready forms for appeals. A party wishing to appeal is responsible for preparing and filing a Notice of Appeal with the local office of the Court. Once an appeal is filed with the Court it must be served on the other parties and a copy must be delivered to the office of the Consent and Capacity Board so that the Board can arrange to prepare a record and transcript of the hearing. As the matter proceeds, each party will be required to prepare other materials that they will have to serve on the other parties and file with the Court in accordance with the rules of the Court.

Appeals may be made on questions of law or fact or both. On an appeal, the Court can substitute its opinion for that of the Consent and Capacity Board. The Court can also send the matter back to the Board for a new hearing.

# PART VII:

Any person who contravenes any provision of the *Mental Health Act* or its regulations is guilty of an offence punishable by a fine of not more than $25,000.

Substitute decision-makers who:

- Knowingly and wrongly misstate either their authority to make the decision or the patient's prior capable wishes;

or

- Knowingly make a substitute decision for a person that is not in keeping with the person's prior capable wishes;

are guilty of an offence punishable by a fine of up to $10,000.

Guardians or attorneys under the *Substitute Decisions Act* may be subject to severe civil and criminal penalties if they fail to comply with the rules set for their conduct or take advantage of their position for personal gain or other improper purposes.

The rules governing Ontario's doctors, nurses and other health professionals state that treatment without legally valid consent is professional misconduct.

# PART VIII:

*Many of the definitions listed below apply to more than one Act.*

## UNDER THE *MENTAL HEALTH ACT*

**Community Treatment Plan** means a plan described in section 33.7 of the ***Mental Health Act*** that is a required part of a Community Treatment Order.

**Health Practitioner** has the same meaning as in the *Health Care Consent Act.*

**Informal Patient** means a person who is a patient in a psychiatric facility having been admitted with the consent of another person under section 24 of the *Health Care Consent Act.*

**Involuntary Patient** means a person who is detained in a psychiatric facility under a Certificate of Involuntary Admission or a Certificate of Renewal.

**Mental Disorder** means any disease or disability of the mind.

**Officer in Charge** means the officer who is responsible for the administration and management of a psychiatric facility.

**Ontario Review Board** is the tribunal that oversees the timing and conditions of the release of persons charged with a criminal offense but found unfit to stand trial or not criminally responsible.

**Patient** means a person who is under observation, care and treatment in a psychiatric facility.

**Physician** means a legally qualified medical practitioner and when referring to a CTO, means a legally qualified medical practitioner who meets the qualifications prescribed in the regulations for the issuing or renewing of a CTO.

**Plan of Treatment** has the same meaning as in the *Health Care Consent Act.*

**Psychiatric Facility** means a facility for the observation, care and treatment of persons suffering from mental disorder, and designated as such by the Minister.

**Rights Adviser** means a person or a member of a category of persons qualified to perform the function of a rights adviser under the *Mental Health Act* and designated by a psychiatric facility, the Minister or the regulations to perform those functions but does not include:

(a) A person involved in the direct clinical care of the person to whom the rights advice is to be given; or

(b) A person providing treatment or care and supervision under a Community Treatment Plan.

**Schedule 1 Psychiatric Facility** means a facility named in the first list of psychiatric facilities that appears in the regulations to the *Mental Health Act.* This list includes provincial psychiatric hospitals, specialty psychiatric hospitals and many general hospitals throughout the province (see Psychiatric Facility).

**Voluntary Patient** is not defined in the *Mental Health Act* but a common dictionary definition of voluntary is "having power of free choice."

## UNDER THE *HEALTH CARE CONSENT ACT*

**Advance Directives** (see "prior capable wishes" below).

**Community Treatment Plan** has the same meaning as the ***Mental Health Act.***

**Consent and Capacity Board** means the tribunal that hears cases under the *Health Care Consent Act,* the *Substitute Decisions Act* and the *Mental Health Act.*

**Emergency** means that a person is apparently experiencing severe suffering or is at risk of sustaining serious bodily harm if treatment is not administered promptly.

**Evaluator** means a member of the College of Audiologists and Speech-Language Pathologists, certified social workers, nurses, occupational therapists or physicians and surgeons.

**Health Practitioner** means a member of any of Ontario's regulated health professions.

**Living Will** is an unofficial name for an advance directive or prior capable wishes (see below).

**Prior Capable Wishes** means wishes given by a person while capable that bind the person's substitute decision-maker after the person becomes incapable. Prior capable wishes may be given orally, included in a power of attorney or some other written document, or expressed in some other manner.

## UNDER THE *SUBSTITUTE DECISIONS ACT*

**Assessor** means a person qualified to do assessments under the *Substitute Decisions Act*. In order to qualify, a person must complete a special course recognized by the Public Guardian and Trustee and comply with certain other requirements. An assessor must be a member of the College of Physicians and Surgeons, psychologists, certified social workers, occupational therapists or nurses.

**Attorney for Personal Care** means a person named in a power of attorney for personal care to make personal care decisions on behalf of another person in the event that the person is incapable of making his or her own decisions.

**Attorney for Property** means a person named in a power of attorney for property to act on behalf of another person with regard to that person's property.

**Guardian of the Person** means a person appointed by the court to make personal care decisions on behalf of another person.

**Guardian of Property** means a person appointed by the court to act on behalf of another person with regard to that person's property.

**Partner** means two people who have lived together for at least one year and have a close personal relationship that is of primary importance in both persons' lives.

**Power of Attorney** is a very powerful type of legal document that one person can use to grant another person or persons authority to make important decisions on his or her behalf. There are powers of attorney for property and powers of attorney for personal care.

**Statutory Guardian** means someone appointed using a special legal process that involves an assessment of a person's capacity to manage property rather than a court order. A Statutory Guardian manages property on behalf of the person who has been found incapable of managing his or her own property.

**Substitute Decision-Maker** is a person authorized to make decisions on behalf of an incapable person.

**Ulysses Contract** is the informal name of a special type of power of attorney for personal care that allows things like forced hospitalization for the purpose of treatment.

# PART IX:

**The following forms are no longer in use under the *Mental Health Act*: 19, 20, 32, 34, 35, 37, 38, 39, 43.**

## FORMS UNDER THE *MENTAL HEALTH ACT*

| Form # | Form Name | Section of the MHA | Who Signs | When | Expiration Date |
|---|---|---|---|---|---|
| 1 | Application by Physician for Psychiatric Assessment | 15 | Physician who has examined the person | Within seven days from and including the examination date | Seven days from and including date signed |
| 2 | Order for Examination | 16 | Justice of the Peace | No statutory time restriction | Seven days from and including the day it is signed |
| 3 | Certificate of Involuntary Admission | 20(1)(c) | Attending physician (different than the physician who completed Form 1) | Within 72 hours from start of detention period under a Form 1 or Form 13 | Two weeks from and including the date signed |
| | | 19 | Attending physician | At any time to change the status of an informal or voluntary patient to involuntary | Two weeks from and including the date signed |
| 4 | Certificate of Renewal | 20(4) | Attending physician | Before expiry date of previous Form 3 or 4 | 1st Certificate of Renewal: one month from expiry date of preceding Form 3, 2nd Certificate of Renewal: two months from expiry date of preceding Form 4, 3rd & subsequent Certificates of Renewal: three months from expiry date of preceding Form 4 |
| 5 | Change from Involuntary to Informal or Voluntary Status | 20(7) | Attending physician (the physician must specify the reasons for the change of status) | Wherever deemed appropriate | Not applicable |
| 6 | Order for Attendance for Examination | 21(1) | Judge | When a person appears before a judge charged with or convicted of an offence | No statutory time restriction |
| 7 | Confirmation By Attending Physician of Continued Involuntary Status | 48 (12) | Attending physician | After an appeal to a court of a board decision is launched (refer to subsection 48(12) for details) | Refer to subsection 48(12) |
| 8 | Order for Admission | 22(1) | Judge | When a person in custody appears before a judge charged with an offence and the judge has reason to believe that the person suffers from a mental disorder | No statutory restriction on time within which an order must be executed. Once executed, it authorizes detention for up to two months |
| 9 | Order for Return | 28(1) | Officer in charge of psychiatric facility | When the absence of a person who is subject to detention becomes known to the officer in charge | One month after absence became known to officer in charge |
| 10 | Memorandum of Transfer | 29(1) | Officer in charge of psychiatric facility | At any time, on advice of attending physician | No statutory time restriction |
| 11 | Transfer to a Public Hospital | 30(1) | Officer in charge of psychiatric facility | At any time when patient requires hospital treatment that cannot be supplied in the psychiatric facility | No statutory time restriction. If involuntary patients are transferred, detention is subject to limitations on certificates |

| Form # | Form Name | Section of the MHA | Who Signs | When | Expiration Date |
|---|---|---|---|---|---|
| 12 | Warrant for Transfer from Ontario to another Jurisdiction | 31 | Minister of Health and Long-Term Care | No statutory time restriction | No statutory time restriction |
| 13 | Order to Admit a Person Coming into Ontario | 32 | Minister of Health and Long-Term Care | No statutory time restriction | No statutory restriction on time within which order must be executed |
| 14 | Consent to the Disclosure, Transmittal or Examination of a Clinical Record | 35 | Patient or person authorized to consent (see section 35(3)) (This form is only required for clinical records in a psychiatric facility.) | No statutory time restriction | No statutory time restriction |
| 15 | Statement by Attending Physician | 35(6) | Attending physician | When disclosure required by court or under an act and certain conditions exist | No statutory time restriction |
| 16 | Application to the Consent and Capacity Board to Review a Patient's Involuntary Status | 39(1) | Involuntary patient or anyone on his or her behalf; Minister of Health and Long-Term Care, Deputy Minister, officer in charge | Refer to s. 39(2) | No statutory time restriction |
| 17 | Notice to the Consent and Capacity Board of the Need to Schedule a Mandatory Review of a Patient's Involuntary Status | 39(4) | Officer in charge of psychiatric facility | On completion of every fourth Certificate of Renewal | Not applicable |
| 18 | Application to the Board to Review a Finding of Incapacity to Manage Property | 60 | Patient or outpatient | Any time after Certificate of Incapacity or Notice of Continuance is issued (once in any six month period) | No statutory time restriction |
| 21 | Certificate of Incapacity to Manage One's Property | 54(4) | Physician who performs the examination under section 54(1) or 54(2) with regard to a person who is a patient in a psychiatric facility under the *Mental Health Act* | No statutory time restriction | On discharge from the psychiatric facility unless a Form 24 is signed within 21 days before discharge |
| 22 | Financial Statement | 55 | Officer in charge | As soon as possible after the Public Trustee becomes the patient's Statutory Guardian | Not applicable |
| 23 | Notice of Cancellation of Certificate of Incapacity to Manage One's Property | 56 | Physician who performs the examination | No statutory time restriction | No statutory time restriction |
| 24 | Notice of Continuance of Certificate of Incapacity to Manage One's Property | 57(2) | Physician who performs the examination | Within 21 days before the patient's discharge | Indefinite |
| 25 | Application to the Consent and Capacity Board to Review the Status of an Informal Patient who is a Child between 12 and 15 Years of Age | 13(1) | Young person between 12 and 15 years of age inclusive | Right to apply once every three months | No statutory time restriction |
| 26 | Notice to the Board of Need to Schedule a Mandatory Review of the Status of an Informal Patient who is a Child between 12 and 15 Years of Age | 13(2) | Officer in charge of psychiatric facility | Six months after admission as an informal patient or the young person's last Form 25 application | Not applicable |

# PART IX: INDEX OF FORMS

*Definitions for some of the terms used in this document can be found on Pages 36-37*

The following forms are no longer in use under the *Mental Health Act*: 19, 20, 32, 34, 35, 37, 38, 39, 43.

## FORMS UNDER THE MENTAL HEALTH ACT

| Form # | Form Name | Section of the MHA | Who Signs | When | Expiration Date |
|---|---|---|---|---|---|
| 1 | Application by Physician for Psychiatric Assessment | 15 | Physician who has examined the person | Within seven days from and including the examination date | Seven days from and including date signed |
| 2 | Order for Examination | 16 | Justice of the Peace | No statutory time restriction | Seven days from and including the day it is signed |
| 3 | Certificate of Involuntary Admission | 20(1)(c) | Attending physician (different than the physician who completed Form 1) | Within 72 hours from start of detention period under a Form 1 or Form 13 | Two weeks from and including the date signed |
| | | 19 | Attending physician | At any time to change the status of an informal or voluntary patient to involuntary | Two weeks from and including the date signed |
| 4 | Certificate of Renewal | 20(4) | Attending physician | Before expiry date of previous Form 3 or 4 | 1st Certificate of Renewal: one month from expiry date of preceding Form 3, 2nd Certificate of Renewal: two months from expiry date of preceding Form 4, 3rd & subsequent Certificates of Renewal: three months from expiry date of preceding Form 4 |
| 5 | Change from Involuntary to Informal or Voluntary Status | 20(7) | Attending physician (the physician must specify the reasons for the change of status) | Wherever deemed appropriate | Not applicable |
| 6 | Order for Attendance for Examination | 21(1) | Judge | When a person appears before a judge charged with or convicted of an offence | No statutory time restriction |
| 7 | Confirmation By Attending Physician of Continued Involuntary Status | 48 (12) | Attending physician | After an appeal to a court of a board decision is launched (refer to subsection 48(12) for details) | Refer to subsection 48(12) |
| 8 | Order for Admission | 22(1) | Judge | When a person in custody appears before a judge charged with an offence and the judge has reason to believe that the person suffers from a mental disorder | No statutory restriction on time within which an order must be executed. Once executed, it authorizes detention for up to two months |
| 9 | Order for Return | 28(1) | Officer in charge of psychiatric facility | When the absence of a person who is subject to detention becomes known to the officer in charge | One month after absence became known to officer in charge |
| 10 | Memorandum of Transfer | 29(1) | Officer in charge of psychiatric facility | At any time, on advice of attending physician | No statutory time restriction |
| 11 | Transfer to a Public Hospital | 30(1) | Officer in charge of psychiatric facility | At any time when patient requires hospital treatment that cannot be supplied in the psychiatric facility | No statutory time restriction. If involuntary patients are transferred, detention is subject to limitations on certificates |

| Form # | Form Name | Section of the MHA | Who Signs | When | Expiration Date |
|---|---|---|---|---|---|
| 12 | Warrant for Transfer from Ontario to another Jurisdiction | 31 | Minister of Health and Long-Term Care | No statutory time restriction | No statutory time restriction |
| 13 | Order to Admit a Person Coming into Ontario | 32 | Minister of Health and Long-Term Care | No statutory time restriction | No statutory restriction on time within which order must be executed |
| 14 | Consent to the Disclosure, Transmittal or Examination of a Clinical Record | 35 | Patient or person authorized to consent (see section 35(3)) (This form is only required for clinical records in a psychiatric facility.) | No statutory time restriction | No statutory time restriction |
| 15 | Statement by Attending Physician | 35(6) | Attending physician | When disclosure required by court or under an act and certain conditions exist | No statutory time restriction |
| 16 | Application to the Consent and Capacity Board to Review a Patient's Involuntary Status | 39(1) | Involuntary patient or anyone on his or her behalf; Minister of Health and Long-Term Care, Deputy Minister, officer in charge | Refer to s. 39(2) | No statutory time restriction |
| 17 | Notice to the Consent and Capacity Board of the Need to Schedule a Mandatory Review of a Patient's Involuntary Status | 39(4) | Officer in charge of psychiatric facility | On completion of every fourth Certificate of Renewal | Not applicable |
| 18 | Application to the Board to Review a Finding of Incapacity to Manage Property | 60 | Patient or outpatient | Any time after Certificate of Incapacity or Notice of Continuance is issued (once in any six month period) | No statutory time restriction |
| 21 | Certificate of Incapacity to Manage One's Property | 54(4) | Physician who performs the examination under section 54(1) or 54(2) with regard to a person who is a patient in a psychiatric facility under the *Mental Health Act* | No statutory time restriction | On discharge from the psychiatric facility unless a Form 24 is signed within 21 days before discharge |
| 22 | Financial Statement | 55 | Officer in charge | As soon as possible after the Public Trustee becomes the patient's Statutory Guardian | Not applicable |
| 23 | Notice of Cancellation of Certificate of Incapacity to Manage One's Property | 56 | Physician who performs the examination | No statutory time restriction | No statutory time restriction |
| 24 | Notice of Continuance of Certificate of Incapacity to Manage One's Property | 57(2) | Physician who performs the examination | Within 21 days before the patient's discharge | Indefinite |
| 25 | Application to the Consent and Capacity Board to Review the Status of an Informal Patient who is a Child between 12 and 15 Years of Age | 13(1) | Young person between 12 and 15 years of age inclusive | Right to apply once every three months | No statutory time restriction |
| 26 | Notice to the Board of Need to Schedule a Mandatory Review of the Status of an Informal Patient who is a Child between 12 and 15 Years of Age | 13(2) | Officer in charge of psychiatric facility | Six months after admission as an informal patient or the young person's last Form 25 application | Not applicable |

| Form # | Form Name | Section of the MHA | Who Signs | When | Expiration Date |
|---|---|---|---|---|---|
| 27 | Notice by Officer in Charge to an Informal Patient between 12 and 15 Years of age | 38(6) | Officer in charge of psychiatric facility | Upon admission | Not applicable |
| 28 | Request to Examine or to Copy Clinical Record | 36(2) 36(16) | Patient or person authorized to consent | No statutory time restriction | No statutory time restriction |
| 29 | Application to the Board to Withhold All or Part of the Clinical Record | 36(4) | Officer in charge | When the attending physician advises that disclosure of the clinical record to the patient is likely to result in serious harm to the treatment or recovery of the patient or serious physical or emotional harm to another person | This request must be made within seven days after the patient makes a written request to examine or copy his or her clinical record |
| 30 | Notice to Patient | 38(1)) | Attending physician | When the patient is put on a Form 3 (Involuntary admission) or a Form 4 (Renewal) | Not applicable |
| 31 | Application to the Board to Review a Patient's Competency to Examine / Disclose his or her Clinical Record | 36(14) | Patient | When a patient is determined to be mentally incompetent to examine, copy or consent to the disclosure of all or part of the clinical record | No statutory time restriction |
| 33 | Notice to Patient | 38(4) 59(1) and Section 15(1) of the regulations | Physician who makes determination | When a physician determines that a patient is not mentally competent to (a) consent to treatment; (b) examine or authorize disclosure of his/her clinical record; or (c) manage his/her property | Not applicable |
| 36 | Notice under ss. 36.1(4) of the Act of Right to Appoint a Representative | 36.1(4) | Attending physician | Within 48 hours of admission to or registration in a psychiatric facility | Not applicable |
| 40 | Notice to Patient of Right to Apply for a Representative | 36.2(2) | Attending physician | As soon as possible after the attending physician's determination that a patient is not mentally competent to appoint a representative to examine or authorize disclosure of his or her clinical record | Not applicable |
| 41 | Application to the Consent and Capacity Board to Appoint a Representative | 36.2(1) | Patient | When the patient is found not mentally competent to appoint a representative to examine or authorize disclosure of his/her clinical record | No statutory time restriction |
| 42 | Notice to Person under ss 38.1 of the Act of Application for Psychiatric Assessment under s. 15 or an Order under s. 32 of the Act | 38.1 | Attending physician | Promptly when a person is detained at a psychiatric facility for the purpose of an assessment under a Form 1 or a Form 13 | Not applicable |
| 44 | Appointment of a Representative | 36.1 | Person appointing representative | No statutory time restriction | The person who made the appointment may revoke it or the person may appoint a new representative |

| Form # | Form Name | Section of the MHA | Who Signs | When | Expiration Date |
|---|---|---|---|---|---|
| 45 | Community Treatment Order | 33.1 | Physician qualified to issue or renew a Community Treatment Order | No statutory time restriction. Examination within 72 hours as precondition for issuing CTO | Up to six months |
| 46 | Notice to Person of Issuance or Renewal of Community Treatment Order | 33.1(10) | Physician | Completed by a physician who issues or renews a CTO at the time the CTO is issued or renewed | |
| 47 | Order for Examination | 33.3 (1) 33.4 (3) | Physician who issued or renewed the Community Treatment Order | Authority for 30 days after issue for a police officer to take the person named in it into custody and then promptly to a physician | 30 days |
| 48 | Application to Board to Review Community Treatment Order and Notice to Board by Physician of Need to Schedule Mandatory Review of Community Treatment Order | 39.1(1) 39.1(4) | Part 1: By person subject to CTO or another person on his/her behalf, Part 2: By physician | Part 1: After CTO is issued, Part 2: Every time a CTO is renewed for the second time and on the occasion of every second renewal thereafter | |
| 49 | Notice of Intention to Issue or Renew Community Treatment Order | 33.1(4) 33.1(8) 14.3 (1) of O.Reg. 741 | Physician who intends to issue or renew a CTO | Before the CTO is issued | |
| 50 | Confirmation of Rights Advice | 14.3 (5) 16 (2) of O.Reg. 74 | Rights Advisor | After rights advice has been given | |

| Form # | Form Name | Section of the MHA | Who Signs | When | Expiration Date |
|---|---|---|---|---|---|
| 27 | Notice by Officer in Charge to an Informal Patient between 12 and 15 Years of age | 38(6) | Officer in charge of psychiatric facility | Upon admission | Not applicable |
| 28 | Request to Examine or to Copy Clinical Record | 36(2) 36(16) | Patient or person authorized to consent | No statutory time restriction | No statutory time restriction |
| 29 | Application to the Board to Withhold All or Part of the Clinical Record | 36(4) | Officer in charge | When the attending physician advises that disclosure of the clinical record to the patient is likely to result in serious harm to the treatment or recovery of the patient or serious physical or emotional harm to another person | This request must be made within seven days after the patient makes a written request to examine or copy his or her clinical record |
| 30 | Notice to Patient | 38(1)) | Attending physician | When the patient is put on a Form 3 (Involuntary admission) or a Form 4 (Renewal) | Not applicable |
| 31 | Application to the Board to Review a Patient's Competency to Examine / Disclose his or her Clinical Record | 36(14) | Patient | When a patient is determined to be mentally incompetent to examine, copy or consent to the disclosure of all or part of the clinical record | No statutory time restriction |
| 33 | Notice to Patient | 38(4) 59(1) and Section 15(1) of the regulations | Physician who makes determination | When a physician determines that a patient is not mentally competent to (a) consent to treatment; (b) examine or authorize disclosure of his/her clinical record; or (c) manage his/her property | Not applicable |
| 36 | Notice under ss. 36.1(4) of the Act of Right to Appoint a Representative | 36.1(4) | Attending physician | Within 48 hours of admission to or registration in a psychiatric facility | Not applicable |
| 40 | Notice to Patient of Right to Apply for a Representative | 36.2(2) | Attending physician | As soon as possible after the attending physician's determination that a patient is not mentally competent to appoint a representative to examine or authorize disclosure of his or her clinical record | Not applicable |
| 41 | Application to the Consent and Capacity Board to Appoint a Representative | 36.2(1) | Patient | When the patient is found not mentally competent to appoint a representative to examine or authorize disclosure of his/her clinical record | No statutory time restriction |
| 42 | Notice to Person under ss 38.1 of the Act of Application for Psychiatric Assessment under s. 15 or an Order under s. 32 of the Act | 38.1 | Attending physician | Promptly when a person is detained at a psychiatric facility for the purpose of an assessment under a Form 1 or a Form 13 | Not applicable |
| 44 | Appointment of a Representative | 36.1 | Person appointing representative | No statutory time restriction | The person who made the appointment may revoke it or the person may appoint a new representative |

| Form # | Form Name | Section of the MHA | Who Signs | When | Expiration Date |
|---|---|---|---|---|---|
| 45 | Community Treatment Order | 33.1 | Physician qualified to issue or renew a Community Treatment Order | No statutory time restriction. Examination within 72 hours as precondition for issuing CTO | Up to six months |
| 46 | Notice to Person of Issuance or Renewal of Community Treatment Order | 33.1(10) | Physician | Completed by a physician who issues or renews a CTO at the time the CTO is issued or renewed | |
| 47 | Order for Examination | 33.3 (1) 33.4 (3) | Physician who issued or renewed the Community Treatment Order | Authority for 30 days after issue for a police officer to take the person named in it into custody and then promptly to a physician | 30 days |
| 48 | Application to Board to Review Community Treatment Order and Notice to Board by Physician of Need to Schedule Mandatory Review of Community Treatment Order | 39.1(1) 39.1(4) | Part 1: By person subject to CTO or another person on his/her behalf, Part 2: By physician | Part 1: After CTO is issued, Part 2: Every time a CTO is renewed for the second time and on the occasion of every second renewal thereafter | |
| 49 | Notice of Intention to Issue or Renew Community Treatment Order | 33.1(4) 33.1(8) 14.3 (1) of O.Reg. 741 | Physician who intends to issue or renew a CTO | Before the CTO is issued | |
| 50 | Confirmation of Rights Advice | 14.3 (5) 16 (2) of O.Reg. 74 | Rights Advisor | After rights advice has been given | |

## FORMS UNDER THE *HEALTH CARE CONSENT ACT*

| Form letter | Form Name | Section of the HCCA | Who Signs | When |
|---|---|---|---|---|
| A | Application to the Board to Review a Finding of Incapacity | 32(1) 50(1) 65(1) | Person determined to be incapable | When a finding is made that a person is incapable of making decisions with respect to treatment, admission to a care facility or personal assistance services in a nursing home or home for the aged |
| B | Application to the Board to Appoint a Representative | 33(1) 51(1) 66(1) | Person determined to be incapable | When a finding is made that a person is incapable of making decisions with respect to treatment, admission to a care facility or personal assistance services in a nursing home or home for the aged |
| C | Application to the Board to Appoint a Representative | 33(2) 51(2) 66(2) | Anyone who is at least 16 years of age and wishes to be appointed as the representative for a person who has been determined to be incapable | When a finding is made that a person is incapable of making decisions with respect to treatment, admission to a care facility or personal assistance services in a nursing home or home for the aged |
| D | Application to the Board for Directions | 35(1) 52(1) 67(1) | Substitute decision-maker or health care practitioner | The substitute decision-maker or health care practitioner requests assistance because a prior wish of the incapable person is not clear or it is not clear if the wish was expressed when the person was capable and at least 16 years old, or is applicable in the circumstances |
| E | Application to the Board for Permission to Depart from Wishes | 36(1) 53(1) 68(1) | Substitute decision-maker or health care practitioner | When the prior capable wishes require the substitute decision-maker to refuse treatment, admission or personal assistance services. (The application may only be granted if the Board finds that the incapable person, if capable, would probably consent because the likely result is significantly better than would have been anticipated in comparable circumstances at the time the wish was expressed) |
| F | Application to the Board for Review of Someone Else's Decision to Consent to Admission for the Purpose of Treatment | 34(1) | Patient | When a health practitioner has made a Finding of Incapacity to consent to treatment and the substitute decision-maker has consented to the admission |
| G | Application to the Board to Review Compliance with Rules for Substitute Decision-Making | 37(1) (treatment) | Health practitioner who proposed the treatment | When the applicant is of the opinion that the substitute decision-maker has given or refused consent in a manner that violates the rules for substitute decisions found in the Act |

| Form letter | Form Name | Section of the HCCA | Who Signs | When |
|---|---|---|---|---|
| G | (cont'd) | 54(1) (admission to a nursing home or home for the aged) | Official of the Community Care Access Centre responsible for authorizing the admission | When the applicant is of the opinion that the substitute decision-maker has given or refused consent in a manner that violates the rules for substitute decisions found in the Act |
| G | (cont'd) | 69(1) (personal assistance services in a nursing home or home for the aged) | Member of the service providers staff responsible for the personal assistance service | When the applicant is of the opinion that the substitute decision-maker has given or refused consent in a manner that violates the rules for substitute decisions found in the Act |
| H | Application to Amend the Conditions of the Appointment of a Representative<br><br>Or Application to Terminate the Appointment of a Representative | 33(7) 51(6) 66(6)<br><br>33(8) 51(6) 66(6) | Any person | At any time after the Board has appointed a representative to make decisions on behalf of an incapable person with respect to treatment, admission to a care facility or personal assistance services in a nursing home or home for the aged |

(*Whenever an application of this kind is submitted the law provides that the patient/client is deemed to have applied for a review of his or her capacity to make the relevant decision. This does not apply if the board has determined the issue of capacity within the previous six months.)

## FORMS UNDER THE *HEALTH CARE CONSENT ACT*

| Form letter | Form Name | Section of the HCCA | Who Signs | When |
|---|---|---|---|---|
| A | Application to the Board to Review a Finding of Incapacity | 32(1) 50(1) 65(1) | Person determined to be incapable | When a finding is made that a person is incapable of making decisions with respect to treatment, admission to a care facility or personal assistance services in a nursing home or home for the aged |
| B | Application to the Board to Appoint a Representative | 33(1) 51(1) 66(1) | Person determined to be incapable | When a finding is made that a person is incapable of making decisions with respect to treatment, admission to a care facility or personal assistance services in a nursing home or home for the aged |
| C | Application to the Board to Appoint a Representative | 33(2) 51(2) 66(2) | Anyone who is at least 16 years of age and wishes to be appointed as the representative for a person who has been determined to be incapable | When a finding is made that a person is incapable of making decisions with respect to treatment, admission to a care facility or personal assistance services in a nursing home or home for the aged |
| D | Application to the Board for Directions | 35(1) 52(1) 67(1) | Substitute decision-maker or health care practitioner | The substitute decision-maker or health care practitioner requests assistance because a prior wish of the incapable person is not clear or it is not clear if the wish was expressed when the person was capable and at least 16 years old, or is applicable in the circumstances |
| E | Application to the Board for Permission to Depart from Wishes | 36(1) 53(1) 68(1) | Substitute decision-maker or health care practitioner | When the prior capable wishes require the substitute decision-maker to refuse treatment, admission or personal assistance services. (The application may only be granted if the Board finds that the incapable person, if capable, would probably consent because the likely result is significantly better than would have been anticipated in comparable circumstances at the time the wish was expressed) |
| F | Application to the Board for Review of Someone Else's Decision to Consent to Admission for the Purpose of Treatment | 34(1) | Patient | When a health practitioner has made a Finding of Incapacity to consent to treatment and the substitute decision-maker has consented to the admission |
| G | Application to the Board to Review Compliance with Rules for Substitute Decision-Making | 37(1) (treatment) | Health practitioner who proposed the treatment | When the applicant is of the opinion that the substitute decision-maker has given or refused consent in a manner that violates the rules for substitute decisions found in the Act |

| Form letter | Form Name | Section of the HCCA | Who Signs | When |
|---|---|---|---|---|
| G | (cont'd) | 54(1) (admission to a nursing home or home for the aged) | Official of the Community Care Access Centre responsible for authorizing the admission | When the applicant is of the opinion that the substitute decision-maker has given or refused consent in a manner that violates the rules for substitute decisions found in the Act |
| G | (cont'd) | 69(1) (personal assistance services in a nursing home or home for the aged) | Member of the service providers staff responsible for the personal assistance service | When the applicant is of the opinion that the substitute decision-maker has given or refused consent in a manner that violates the rules for substitute decisions found in the Act |
| H | Application to Amend the Conditions of the Appointment of a Representative | 33(7) 51(6) 66(6) | Any person | At any time after the Board has appointed a representative to make decisions on behalf of an incapable person with respect to treatment, admission to a care facility or personal assistance services in a nursing home or home for the aged |
| | Or Application to Terminate the Appointment of a Representative | 33(8) 51(6) 66(6) | | |

(*Whenever an application of this kind is submitted the law provides that the patient/client is deemed to have applied for a review of his or her capacity to make the relevant decision. This does not apply if the board has determined the issue of capacity within the previous six months.)

## FORMS UNDER THE *SUBSTITUTE DECISIONS ACT*

| Form letter | Form Name? | Section of the SDA | Who Signs | When |
|---|---|---|---|---|
| 1 | Application to Replace the Public Guardian and Trustee as Statutory Guardian | 17(1) | Person wishing to become the Statutory Guardian | At any time after a Statutory Guardianship is created |
| 2 | Management Plan | 17(3) 70 (1)(b) | Person wishing to become the Statutory Guardian or court-appointed guardian of property | When making an application to replace the Public Guardian and Trustee as Statutory Guardian (Form 1) or an application to the court to be named as the guardian of property for an incapable person or at any other time when a management plan for property is required |
| 3 | Guardianship Plan | 70(2)(b) | Proposed guardian for personal care | When making an application to the court to be named as guardian of the person for an incapable person or at any other time when a management plan for personal care is required |
| 4 | Request for Assessment of Capacity | 16(1) | Any person | At any time when the applicant has reason to believe that a person may be incapable of managing property. Prior to signing, the applicant must make reasonable inquiries and satisfy him or herself that no spouse, partner or relative intends to apply to the court for the appointment of a guardian of property and that there is no continuing power of attorney that gives the attorney authority over all of the person's property |
| 5 | Statement Required Under Paragraph 1of Section 50(1) of the Act | 50(1) | Person making a power of attorney for personal care under section 50 of the Act (Ulysses Contract) | At the time that the power of attorney for personal care under Section 50 of the Act (a Ulysses Contract) is executed or within 30 days afterwards |
| 6 | Optional Statement to Appoint a Guardian of the Person | 71(1) | A person making application to the court for the appointment of a guardian of the person | At the time that the application to appoint a guardian of the person is made to the court |
| 7 | Optional Statement to Terminate Guardianship of the Person | 71(2) | Person asking the court to terminate guardianship of the person | At the time that the motion to terminate the guardianship of the person is made to the court |
| 8 | Statement of a person who is not an Assessor under Section 72 of the *Substitute Decisions Act* | 72 | Person who knows the person alleged to be incapable and has been in personal contact with him or her during the last twelve months | At the time that an application to the court is made by way of summary disposition for the appointment of a guardian of property (Summary disposition means that the judge is asked to decide the matter based on the information in the court file instead of holding a session in open court) |

| Form letter | Form Name | Section of the SDA | Who Signs | When |
|---|---|---|---|---|
| 9 | Statement of a Person who is not an Assessor under Section 73 of the *Substitute Decisions Act* | 73 | Person who knows the person whose property is under guardianship and has been in personal contact with him or her during the last twelve months | At the time that a motion is brought before the court to terminate a guardianship of property |
| 18 | Application to the Board for a Review of a Finding of Incapacity to Manage Property | 20.2(1) | Person found to be incapable of managing property and who is under Statutory Guardianship | At any time<br>An application may only be made once within a six-month period<br>A reassessment may be required prior to application being made |

Brian's Law permits the Minister of Health and Long-Term Care to approve forms for the purposes of Brian's Law, which amended the *Mental Health Act* and the *Health Care Consent Act, 1996*. Brian's Law was proclaimed on December 1st, 2000.

## FORMS UNDER THE *SUBSTITUTE DECISIONS ACT*

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